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REPORT OF CASES

PRESENTED BY THE

COURT OF QUEEN'S BENCH

CHRISTOPHER J. BISHOP, ESQ.

CLERK OF THE COURT OF QUEEN'S BENCH

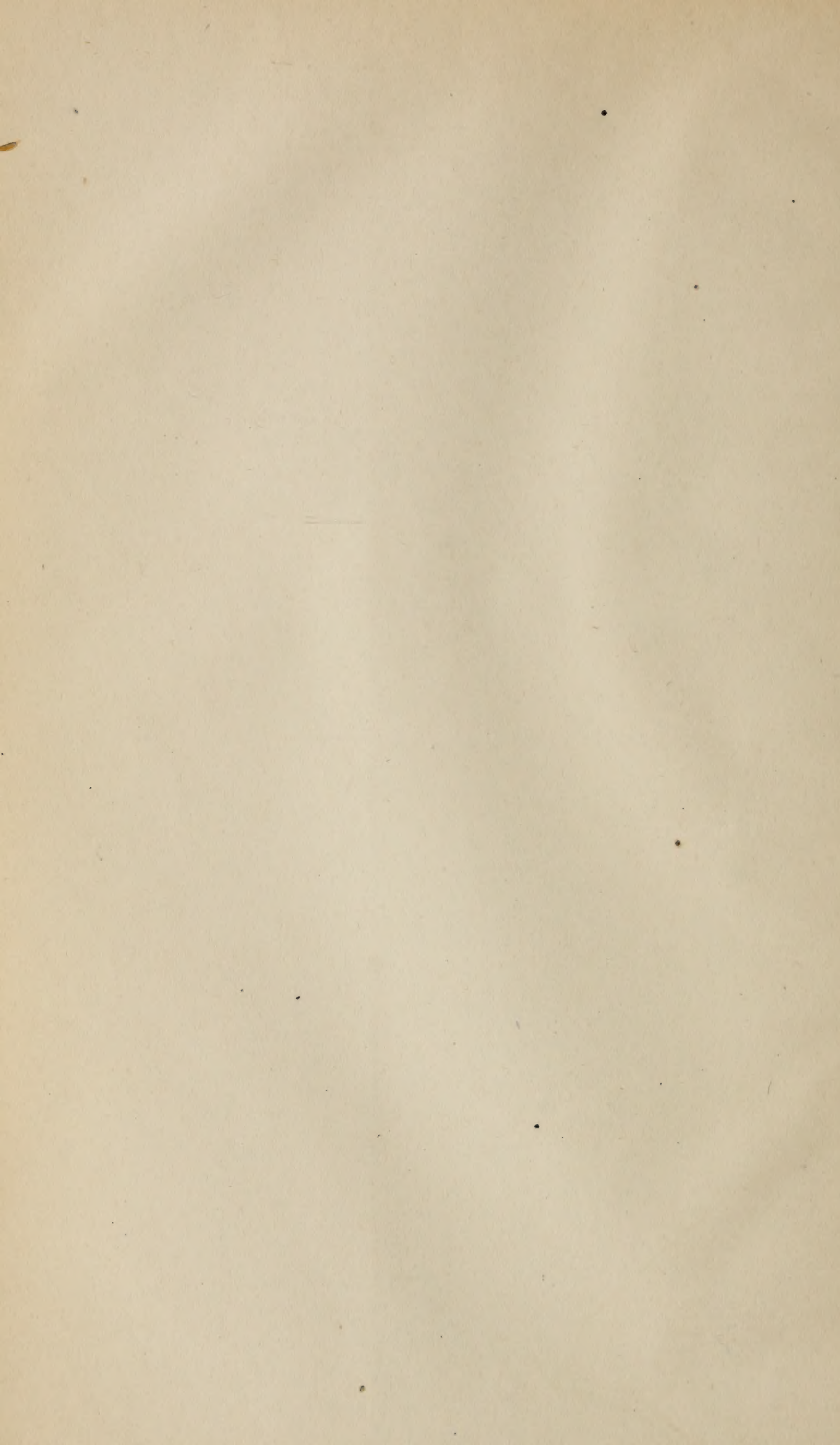
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1875



REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

BY

CHRISTOPHER ROBINSON, ESQ.,

BARRISTER AT LAW AND REPORTER TO THE COURT.

VOL. XVI.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM 21 VICTORIA, TO TRINITY TERM 22 VICTORIA :
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO :

R. CARSWELL.

1859.

R. CARSWELL, LAW BOOKSELLER, ADELAIDE STREET, TORONTO.

JUDGES
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

" ARCHIBALD McLEAN, J.

" ROBERT EASTON BURNS, J.

Attorney-General.

HON. JOHN A. MACDONALD.

A

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REPORTS OF CASES
IN THE
COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 21 VICTORIA (*Continued*).

Present :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.,
" ARCHIBALD McLEAN, J.,
" ROBERT EASTON BURNS, J.

JONES V. RACHEL CLEAVELAND.

Agreement for sale of land—Possession by vendee—Statute of Limitations.

A. entered into possession of land in 1833, and in 1834 made an agreement to purchase it from B., the owner, the purchase money being payable by instalments, with interest, the last of which would fall due in 1839, when a deed was to be given. Nothing was said in the agreement about possession or the right to it; and A. continued to hold for more than twenty years without making any payment.

Held, that A. was only tenant at will; that the will determined at the expiration of a year from the execution of the agreement; and that B. bringing ejectment in 1857 was barred by the statute.

EJECTMENT, for a small tract of land in the township of Brockville. Writ issued on the 27th of January, 1857.

The plaintiff claimed as heir of Sir Daniel Jones, the defendant under the Statute of Limitations.

At the trial, at Brockville, before *McLean*, J., it appeared that the plaintiff's father, Sir Daniel Jones, being the owner of the land, contracted, on the 18th of June, 1834, to sell it to Palmer Cleaveland, since deceased, who was the husband of the present defendant.

The written contract between the parties, under their seals, was produced and proved on the trial. It expressed

that the vendee was to pay £125 for the lot, as follows ; £25 with interest from the 1st of January then last past, to be paid on the 1st of January, 1835, and £25, with interest as aforesaid, on the first of January in each year thereafter, until the whole sum should be paid. This made the last payment fall due on the 1st of January, 1839, not much more than eighteen years before the bringing of this action.

The vendor bound himself to convey the land in fee simple to the vendee, as soon as the purchase money with interest should be paid, provided it should be paid at the times appointed in the agreement, but not otherwise.

The vendee covenanted to pay the money according to the contract, and each bound himself to the other in £500 for the due performance of the agreement.

It was proved that the vendee had gone into possession of the land in 1833, and built a house on it, in which he lived till his death, and that his widow had been ever since in possession. There was no proof of any money having been paid to Sir Daniel Jones or his representatives after his death, and no payment was endorsed on the contract.

One witness swore that he heard Palmer Cleaveland say that he had bought this lot of Sir Daniel Jones, and was to build a barn, but he knew nothing of the terms of the sale, and there was no proof of any barn being built. Another witness swore that Sir Daniel Jones was always easy in money matters.

Sir Daniel Jones died in 1838, at Brockville, having resided there up to that time, and of course being well aware that the vendee was in possession of the land. The vendee died about two years ago, leaving his widow in possession.

The present plaintiff, the only child of Sir Daniel Jones, was about two years of age in 1838, when his father died.

Sir Daniel Jones' title to the land commenced on the 31st of October, 1828, when a deed of partition was executed between him and his brother, who were devisees of this and other property under their father's will.

There was nothing whatever said in the contract about the vendee being in possession, or about his receiving possession.

The defendant's counsel contended that Cleaveland could only be looked upon as a tenant at will; that the statute began to run at the end of a year after he went upon the land; and having commenced to run, it would continue to run on against the present plaintiff, notwithstanding his infancy.

A verdict was rendered for the plaintiff, and leave reserved to defendant to move for a nonsuit.

A. *Richards* obtained a rule *nisi* accordingly. He cited *Ball v. Cullimore*, 2 Cr. M. & R. 120; *Doe Bennett v. Turner*, 7 M. & W. 226; S. C. 9 M. & W. 643; *Doe Goody v. Carter*, 9 Q. B. 863; *Doe dem. Dayman v. Moore*, *Ib.*, 555; *Garrard v. Tuck*, 8, C. B. 251; *Doe Stanway v. Rock*, 4 M. & Gr. 30; *Doe Quinsey v. Caniffe*, 5 U. C. R. 602; *Doe Roylance v. Lightfoot*, 8 M. & W. 553; *Rogers v. Grazebrook*, 8 Q. B. 895.

D. *Jones* shewed cause.

ROBINSON, J. C.—Of course the written contract, executed by both the vendor and vendee, amounted to an acknowledgment by Palmer Cleaveland at that time (the 18th of June, 1834) of Sir Daniel Jones' title, so that the time during which he had held possession before that may be left out of the question. The vendee had probably gone into possession as an intending purchaser, upon some verbal understanding, before the written contract was executed. I infer from the evidence that that was the case.

The reservation of interest upon the purchase money, and the allowing the vendee to go into possession, does not in effect make the purchaser a *quasi* tenant for years. He is, while in possession under such circumstances, merely a tenant at will. The case of *Doe dem. Tones v. Chamberlaine*, (5 M. & W. 14)), and *Ball v. Cullimore* (2 Cr. M. & R. 120), establish that position.

The circumstance that the present plaintiff was an infant when his father, Sir Daniel Jones, died in 1838, and for many years afterwards, is immaterial; for if the statute began to run against the father, it continued to run against his heir, notwithstanding his infancy. We have then to consider that Palmer Cleaveland, being tenant at will, was

at any time liable to be dispossessed by ejectment, for Sir Daniel Jones held the legal title; and though Palmer Cleaveland held an equitable interest as purchaser, he had no legal interest—no term—nothing to protect him against Sir Daniel Jones, if at any time he had chosen to demand possession. The sealed agreement did not profess to assure the possession to him, either before default in payment or after payment should be made. He was all the time at the mercy of the vendor and his heir, so far as the legal remedy by ejectment is concerned.

Then after the first year from the execution of that agreement, which amounted to an acknowledgment that Sir Daniel Jones was then the owner, the statute began to run, unless we can see something peculiar in this case to prevent it. I see nothing further than this, that by the sealed contract the vendee was to receive a title from the vendor if he made his payments; and the plaintiff's counsel argued ingeniously, and at first sight there would seem to be weight in the argument, that we must look upon the vendee as acknowledging title in the plaintiff up to the time when by the contract it was stipulated that the vendor should convey to him; that would be the 1st of January, 1839, if the vendee should then have made all his payments; and that our statute did not begin to run till after that date. I refer to the cases of *Doe dem. Roylance v. Lightfoot* (8 M. & W. 553), and *Rogers v. Grazebrook* (8 Q. B. 895), as bearing somewhat upon that point. Can we hold that merely because the vendee had till the 1st of January, 1839, to pay for the land, and was in possession (for nothing more than this appears), he was therefore tenant to the vendor, and entitled to retain possession till that day? If he was, then of course the statute could not begin to run till afterwards; but the above cases, and the plain reason of the thing, I think, compel us to hold otherwise, and to say that we can only look upon him as tenant *at will* from the execution of the deed.

If so, why should not the statute begin to run after the 18th of June, 1835? The only ground that the case can seem to admit of is that which I have just stated, and which the plaintiff's counsel endeavoured to establish; namely, that

the sealed contract of sale does in its terms admit that the plaintiff was then in a position to make a title; in other words, that he owned the land, *and would be in a position to make a title when the last payment was to be made, on the 1st of January, 1839*; and indeed, if the admission could be applied to the 1st of January, 1838, the effect would be the same, for twenty years have not elapsed between that and bringing this action.

But can we so carry forward any admission of title that arises from the terms of the deed? If Sir Daniel Jones had promised to make Palmer Cleaveland a lease for ten years of the land, and had let him into possession, he would have been only tenant at will till he got the lease; and the promise to make a lease for ten years, given on the one side and accepted on the other, could not be relied on as equivalent to an admission by Palmer Cleaveland that Sir Daniel Jones would be the owner of the reversion to the end of the proposed term, so as to make it, under the 26th clause of 4 Wm. IV., ch. 1, an acknowledgment of title that shall operate to give a new starting-point, not merely from the date of such acknowledgment (which is what the clause evidently intends) but from the end of the term proposed to be created, as in this case, from the time when Sir Daniel Jones undertook to make a title, provided he should in the meantime be paid. In my opinion we cannot so apply the 26th clause of our statute 4 Wm. IV., ch. 1; for independently of all other argument upon the point, the very language of the clause is express against it; for it says, that in case of any written acknowledgment of title, the right of the person whose title has been so acknowledged to make an entry, or to bring an action, "shall be deemed to have first accrued *at and not before the time at which such acknowledgment*, or the last of such acknowledgments, if more than one, was given." The consequence is, that the statute having begun to run after a year from the execution of the agreement, Palmer Cleaveland being then in possession, and Sir Daniel Jones being then living in Canada, it has continued to run from that time; and there having been no written acknowledgment of title given since, nor any payment of rent or purchase money

proved, there is nothing to prevent the usual effect of the lapse of twenty years.

I think therefore that a nonsuit must be entered.

MCLEAN, J.—It is not shewn by what authority Cleaveland originally entered upon the lot purchased by him, the agreement for the sale being silent as to the right of possession, but it may fairly be assumed that he obtained possession from Sir Daniel Jones for the purpose of making such improvements upon it as he might require.

It was proved that he had built upon and occupied the premises for a considerable time before Sir Daniel's death, and having in fact no right of entry, he must be considered as a tenant at will, liable to be dispossessed at any time by Sir Daniel. If then Cleaveland was tenant at will at the time of the agreement to become the purchaser, or before it, the right of Sir Daniel Jones, by the 19th section of the 4th Wm. IV., ch. 1, to make an entry or distress, or to bring an action to recover the land, is deemed to have first accrued "either at the determination of such tenancy, or at the *expiration of one year* next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined."

The tenancy is not shown to have been determined by Sir Daniel Jones at any time after the agreement to sell, and must therefore be deemed to have determined at the expiration of one year from the date of that instrument, and then the right to bring an action to recover the land, according to the section referred to, first accrued.

By the 16th section it is provided, that no person shall bring an action to recover any land but within twenty years next after the time at which the right to bring such action shall have first accrued to the person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to bring such action shall have first accrued to the person bringing the same. The action having first accrued at the expiration of a year from the date of the agreement—that is, on the 18th June, 1835

—no action to recover the land can be maintained unless brought within twenty years from that date. It follows that this action not having been brought within twenty years from the time it first accrued to Sir Daniel Jones under the statute, cannot now be maintained by the plaintiff who claims under him. By the provisions of the statute every action for the recovery of land must be brought within twenty years from the time of its first accruing, and no reservation of any time is made for an infant to sue after becoming of age. The statute having commenced to run during the lifetime of Sir Daniel Jones, its operation was continued, notwithstanding his death and the infancy of the plaintiff, his heir at law.

BURNS, J., concurred.

Rule absolute.

REGINA V. CUMMINGS.

Embezzlement by bank clerk—Form of indictment—Contra formam statuti—
19 Vic., ch. 121, sec. 40.

The prisoner, being a clerk in the Bank of Upper Canada, was placed in an office apart from the bank, and entrusted with funds for the purpose of paying persons having claims upon the government, which payments were made upon the checks of the Receiver-General, whose office was in the same building. While so employed a deficiency was discovered in his accounts, which he at first ascribed to a robbery, but he afterwards confessed that he had lent the monies entrusted to him to various friends. It also appeared that on a certain day he had received a check from the Receiver-General for £1439 15s., for coupons on government debentures held by the bank, and had credited himself in account with that sum as if paid out by him on the check, making no entry of the coupons, thus covering his deficiencies by so much, and making it appear that he had paid out the amount of the check in cash, when in fact he had paid nothing.

The indictment contained two counts; *the first* charging that on, &c., the prisoner, being a clerk, then employed in that capacity by the bank, did then and there in virtue thereof receive a certain sum, to wit, £1439 15s. for and on account of the said bank, and the said money feloniously did embezzle. *The second*, that he, as such clerk, received a certain valuable security, to wit, an order for the payment of money, to wit, £1439 15s. for and on account of the said bank, and the said valuable security feloniously did embezzle. On this indictment he was convicted of embezzlement.

Held, First, that the indictment was sufficient in form, the omission of the conclusion *contra formam statuti* being no objection.

Secondly, that the prisoner had been guilty of embezzlement within the 19 Vic., ch. 121, sec. 40; and the conviction was affirmed.

EMBEZZLEMENT. At the trial, at Toronto, before *Draper*, C. J., the evidence established that the prisoner, being a clerk in the Bank of Upper Canada, was in that capacity placed

by the Bank in charge of an office in a building apart from the Bank, but in the same town ; and funds were from time to time supplied to him by the Bank, for the purpose of enabling him to make payments to salaried officers and others who had claims upon the government, which payments were made by him upon cheques drawn by the Receiver-General upon the Bank.

It was an arrangement made by the Bank for the convenience of the government and its officers, the room occupied by the defendant for that purpose being within the same building as the Receiver-General's office.

While the defendant was so entrusted by the Bank with large amounts of money in their bills, out of which to make disbursements upon cheques drawn upon the Receiver-General, it turned out that there was a large deficiency in his funds, which he at first ascribed wholly to an alleged robbery of the funds from the safe in his office ; but afterwards confessed that he had from time to time lent large sums of money to several parties named, not upon any transactions or claims of such parties with or upon the Bank or the government, but relying, as he said, that those to whom he had lent the Bank funds, without the authority or knowledge of the Bank, would replace the money.

It was not proved in the case whether he derived or intended to derive any gain to himself by such loans, either in the shape of interest, or by a participation in any profits that might arise from the use of the money by those to whom he had lent it.

All these loans had been concealed from the knowledge of the Bank, no entry of them having been made in the accounts which he rendered to the Bank of each day's transactions.

In addition to the prisoner's own confession of his having made this misappropriation of the monies of the Bank entrusted to him for the special purpose mentioned, it was proved that on a certain day (12th of March, 1857), he had received a cheque from the Receiver-General for £14391 5s., which he had delivered in at the Bank, and had entered in his account as shewing a disbursement made by him in cash

to the Receiver-General out of the funds entrusted to him for that purpose, such entry apparently acquitting him of that amount. But it was afterwards discovered, and was proved upon the trial, that this was not a true account of the transaction.

The prisoner had paid out no money to the Receiver-General upon the cheque in question, but the cheque was made by the prisoner, as Bank clerk, upon the government for coupons which were held by the Bank on their own account, or on behalf of others, in respect of interest that had accrued on government debentures lying in the Bank; and the prisoner, by omitting to make any entry in his book of these coupons, which he gave up in exchange for the cheque, in effect concealed from the knowledge of the Bank the real nature of the transaction, and covered his deficiencies to that extent, by making it appear that he had paid out £1439 15s. of the money of the Bank upon that cheque, and keeping out of view the delivery by him to the Receiver-General of the coupons on account of which alone he had obtained the cheque. If he had made the proper entries, this transaction of the coupons could not have affected the state of his cash account, and he would have had the £1439 15s. still to account for.

This was submitted to the jury as evidence of his fraudulent intention, and as shewing a misappropriation of the funds to that extent at least; for the £1439 15s., which ought to have been in his hands as much as if no cheque had been drawn upon him, was not forthcoming. And indeed it was plain from his own admissions that that amount was only a part of his deficiencies, which was covered from view by this omission to enter the coupons as delivered out by him.

The prisoner was indicted on two counts. The first charged that on the 11th of March, 1857, he being a clerk then employed in that capacity by the Bank of Upper Canada, did then and there, in virtue thereof, receive a certain sum of *money*, to wit, £1439 15s., for and on account of the said Bank of Upper Canada, and the said money feloniously did embezzle.

The second count charged that the prisoner, on the 11th of March, 1857, being a clerk, &c., and employed, &c., (as in the first count) did then and there in virtue thereof receive a certain valuable security, to wit, an order for the payment of £1439 15s., for and on account of the said Bank of Upper Canada, and the said valuable security feloniously did embezzle.

There was no conclusion of the offence in either count being contrary to the statute.

The jury found a general verdict—"Guilty of embezzlement,"—upon which verdict judgment was given.

The defendant appealed, under the statute 20 Vic., ch. 61. *Galt* for the crown.

Eccles, Q. C., and *D. B. Read*, for the prisoner, cited *Rex v. Groves*, 7 C. & P. 635; *Regina v. Lloyd Jones*, 8 C. & P. 288; *Rex v. Chapman*, 1 C. & K. 119; *Regina v. Lambert*, 2 Cox. Cr. C. 309; *Regina v. Holloway*, 2 C. & K. 942; *Rex v. Jones*, 7 C. & P. 833; *Rex v. Bakewell*, Russ. & Ry. 35; *Rex v. Aslett*, *Ib.* 67; *Sill v. The Queen*, 17 Jur. 208; *Regina v. O'Brien*, 13 U. C. R. 436; *Rex v. Pearson*, 1 Moo. C. C. 313; *Regina v. Radcliffe*, 2 Moo. C. C. 68; *Rex v. Clark*, Russ & Ry. 181; *Rex v. Smith*, *Ib.* 267; *Rex v. Turner*, 1 Mood. C. C. 347; *Rex v. Murray*, *Ib.* 276. See also *Rex v. Bass*, 1 Leach 251; *Rex v. Bazeley*, 2 Leach 835; *Rex v. Chipchase*, *Ib.* 699; *Rex v. Ashlett*, *Ib.* 958.

The statutes bearing on the case are referred to in the judgments.

ROBINSON. C. J.—Several questions are presented in this case. The prisoner is indicted under the statute 19 Vic., ch. 121, sec. 40, which makes it felony for a cashier, manager, clerk, or servant of the Bank to secrete, embezzle, or abscond with any bond, obligation, bill or note, or any security for money, or any moneys or effects *entrusted to him* as such clerk, &c., whether the same belong to the said Bank, or belonging to any other person which shall have been deposited with the Bank. This act came into force on the 1st of January, 1857. It has been suggested that the alleged embezzlement may, for anything that has been clearly estab-

lished by the evidence, have taken place before that date, and if so it would not come under that act. If that were so, it would be immaterial, because another statute relating to the Bank of Upper Canada, 6 Vic., ch. 27, sec. 31, which was in force till this latter act repealed it, contained a similar clause, which was taken from it and inserted in the other, and it can make no difference whether the case came within the former act or the one now existing.

The first objection taken is to the sufficiency of the indictment. It is objected that it is bad, because it wants the conclusion *contra formam statuti*. Upon that point we are to consider, in the first place, whether such a conclusion is any longer necessary, and next, if it be, whether it is an objection that can be taken after verdict.

Upon the first point, our statute 4 & 5 Vic., ch. 24, sec. 46 (which is a transcript of the British act, 7 Geo., IV., ch. 64, sec. 20) enacts, that no judgment upon an indictment for felony, after verdict, shall be reversed "*for want of the averment of any matter unnecessary to be proved.*" This has been held in England not to dispense with the necessity of the conclusion *contra formam statuti*, when it would have been necessary before, and an indictment wanting the conclusion was held bad after verdict, though that clause 7 Geo. IV., ch. 64, sec. 20, was relied upon. I refer to 1 Moo. Cr. Ca. 313; 2 Lewin 57; 2 Moo. Cr. Ca. 68.

If it had not been for these decisions I should have thought it might reasonably have been held otherwise, for it certainly is not necessary to prove that any offence of which the particulars have been given in evidence is contrary to a statute. If it be so in fact the court is bound to notice it, and not being a matter necessary to be *proved*, it would seem to be the effect of that clause that it need not be averred. No reasons are given for the decisions in England, but we shall of course conform to them.

In the Imperial statute 7 Geo. IV., ch. 64, is contained also a clause (21) that where the offence charged has been created by any statute, the indictment shall, *after verdict*, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

In our statute 4 & 5 Vic., ch. 24, sec. 47, there is precisely the same provision. It might seem reasonable to hold that that clause dispensed with the necessity of a conclusion *contra formam statuti*, because undoubtedly an indictment may charge an offence in the exact words of the statute which has created it, and yet not contain the words "against the form of the statute;" and it would seem to be in opposition to the very words of this provision to hold that it is on that account insufficient. It has, however, been decided in England, that, notwithstanding that clause, an indictment upon a statute which wanted the conclusion *contra formam statuti* was insufficient; or rather that conclusion has been held necessary since this enactment as well as before, by which we must understand that this particular clause did not, in the opinion of the court, dispense with the necessity, though I have not found the question discussed in relation to that clause of the statute expressly.

We have then our statute 18 Vic., ch. 92, which contains an enactment that "no indictment for any offence shall be held insufficient for want of the averment of *any formal matter*, or matter unnecessary to be proved" (sec. 25); and further, "that every objection to an indictment for any formal defect apparent on the face thereof, shall be taken by demurrer, or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared." (Sec. 26.)

I take it to be the effect of these clauses, that if this objection had been taken at the trial before the verdict, the court could have allowed it to be amended, and if so, then it cannot prevail after verdict.

But what seems to me to be conclusive is the 47th clause of the same statute, which enacts that indictments may be in certain forms (which are given in an appendix) in charging the offences to which such indictments severally relate, and that, *in offences not enumerated therein*, the said forms shall

guide as to the manner in which such offences shall be charged, so as to avoid surplusage and the averment of matters not required to be proved. The statute then gives the form of an indictment for embezzlement, not adding any conclusion *contra formam statuti*, and this form sanctioned by the statute is followed precisely in the indictment in the present case.

I do not think we can hold that the form thus sanctioned by the legislature is insufficient. It is remarkable that our statute 18 Vic., ch. 92, though taken almost entirely from the Imperial act 14 & 15 Vic., ch. 100, does not contain that provision which forms part of sec. 24 in the Imperial act, "that no indictment shall be held insufficient for want of a proper or formal conclusion," which provision has been considered in England to have removed all objections for want of a conclusion *contra formam statuti*. The other provisions of our statute which I have noticed were probably assumed to render that unnecessary.

As to the other objections which have been taken. The money, or Bank notes, which may now be described as money, where in this case placed in the prisoner's possession by his employers, the Bank of Upper Canada. It is, therefore, not a case of embezzlement, according to the proper legal acceptation of the term, which implies that the clerk or servant has secreted or made away with money or goods, which in the discharge of his duty he has received from others for his employer, and has converted to his own use, or made away with, never having allowed it to get into his employer's possession. Here the Bank notes, while in the possession of a clerk of the Bank, though employed by them in a particular service, might, as I consider, be held to be in the possession of the Bank. But whether, as a consequence, the prisoner might or might not properly have been found under the 16th clause of 28 Vic., ch. 92, guilty of larceny, and even upon an indictment framed as this is for embezzlement, it is unnecessary now to consider, because the jury have not in fact found him guilty of larceny, but of embezzlement.

The only question, therefore, is, whether the evidence can be said to sustain a conviction for embezzlement.

Although the definition of embezzlement is such as I have stated, yet there are various statutes, and not all of modern date, which have used the term embezzlement as applicable to cases in which the money or thing embezzled has been entrusted to the clerk or servant by his employer. I refer to the statute 21 H. VIII., ch. 7, and to 27 H. VIII., ch. 17.

The English statute 39 Geo. III., ch. 85, while it was in force, preserved the distinction between larceny and embezzlement as I have stated it. But the statute under which this indictment was preferred, 19 Vic., ch. 121, uses the term embezzlement in a broader and more popular sense (in sec. 40) and expressly makes it felony for any clerk of the Bank to secrete or *embezzle* bills, notes, moneys, &c., entrusted to him as such cashier, by which I understand bills, notes, moneys, entrusted to him by his employer.

• If then the evidence proved that the defendant in this indictment dishonestly made away with any notes or moneys entrusted to him by the Bank, he embezzled it within the meaning of this act, and has committed the offence made felony by the act.

The English statute 15 Geo. II., ch. 13, sec. 12, relating to the Bank of England, contains a clause very similar; and assuming that our statute, as well as that, is meant to apply to cases where the money, &c., of the Bank, or of others making deposits therein, has been entrusted to the clerk by the Bank, then it must follow, as a consequence, that when the fraudulent appropriation of the clerk is in the statute called embezzlement, an indictment framed upon the statute may safely call it by the same name, since the passing of the statute 4 & 5 Vic., ch. 24, sec. 47, if there could have been a difficulty before.

The statute authorises us to apply the term embezzlement under such circumstances in the case of bank clerks, and makes the act felony, and in my opinion we cannot in the face of an enactment hold the act not to be embezzlement, or that such embezzlement is not felony.

Then as to the case upon the evidence: though it did not prove what in a strict legal sense is defined to be embezzlement, or would have supported an indictment for embezzle-

ment under the British statute 39 Geo. III., ch. 85, while it was in force, it proved what in the case of a bank clerk under our statute 19 Vic., ch. 121, is by the Legislature termed embezzlement. The tendency of recent legislation is to abolish in such cases all the technical distinctions between larceny and embezzlement, by making the offence in both cases felony, and leaving them to be dealt with in the same manner as to punishment, and by simplifying as much as possible the proceedings in such cases; and it appears to me that our statute, like the statute 21 H. VIII., ch. 7, as I have already remarked, designates by the word embezzlement the act of a bank clerk in purloining or fraudulently making away with the property of his employers, and consequently authorizes the term to be used in that sense in all prosecutions under the statute 19 Vic., ch. 121, sec. 40.

It was proved here that these notes of the Bank being entrusted by the Bank to the prisoner, to be used in their service for a particular purpose, he did at times, and in a manner known only to himself, and to those who were acting in concert with him, embezzle within the meaning of the Bank Act, a large amount of these Bank notes.

These notes, being the promises of the Bank itself, and not upon which moneys were secured to the Bank, they could not, as the law formerly stood, have been made the subject of an indictment for larceny at the instance of the Bank under the statute of Geo. II. But under the recent enactment in the 20th sec. of 19th Vic., ch. 92, if not by previous enactments, I take the law to be otherwise now in prosecutions like the present.

The notes of the Bank, ready to be issued, from the moment they leave the Bank, if not while they are deposited therein are in the view of the law as money, and may be so described in an indictment, and their clerk who embezzles or steals them, and puts them in circulation, in effect robs the Bank of so much money, as much as if he had taken out an equal amount of specie. This, however, is the part of this case on which I have had most doubt.

As to the prisoner not having been proved to have made away with the money otherwise than by lending it to others,

there is no force in that objection. If he had given it all away the legal effect would have been the same as if he had spent it all for purposes of his own, and *a fortiori* his lending it among a number of persons, as he has acknowledged he did, is a fraudulent appropriation of the money of his employers.

Upon what terms he lent it, nobody but himself can know, and those to whom he lent it; but as all reasonable presumptions may be entertained against wrong-doers, and more especially persons acting fraudulently, by concealing their misappropriation of other persons' property entrusted to their care, it might well be assumed (if it were necessary that the jury should be satisfied of that fact) that the lending by the prisoner of such large sums of money to different persons was not without some motive or prospect of advantage to himself; but at any rate, the fact of his having lent the money, as he has himself asserted, affords, I think, no exculpation, more especially in prosecutions under the statute. The effect upon his employers' interests is the same. The object of late enactments upon this subject is to check a growing evil—the dishonesty of treasurers, clerks, and agents, who must necessarily in the course of their business have great opportunities for committing frauds; and without reference even to these statutes, if an apprentice or journeyman of a goldsmith were to steal watches from his master, to give them to a friend, he would be no less guilty of larceny than if he made any other use of them.

It has been argued that when the prisoner lent these monies to the amount of several thousands of pounds he intended to replace them, and relied on being able to do so, and that his conduct therefore was not fraudulent. It would be inconsistent, I think, with the spirit of all these enactments to admit that to be a defence. As to replacing the very notes that he embezzled, and gave or lent to his friends, that of course would be impossible. The moment they were put in circulation by the borrowers, it became morally impossible to *replace* the identical notes which had been abstracted. All that the prisoner could have expected or intended was that he might be able to repay the same amount, which certainly could not do away with the original felonious taking.

It has been for some years past a common occurrence for treasurers and clerks of corporate banks, and agents of individuals, in England, to apply the money of their employers in purchasing railway shares or other stocks for themselves or their friends. In most, if not all of such cases, I dare say the intention and hope has been of the persons so acting, that they might be able to sell their stock at a profit, and pocket the difference, replacing the money which they had embezzled, before any discovery could be made of the deficiency. We have seen the ruin brought upon themselves and others by the disappointment of such expectations, and I have no hesitation in saying that the intention of the law is to protect, by the fear of punishment, the property of others from being thus fraudulently applied, and exposed to the risk of such speculations.

Then as to any other peculiarity in this case. It is quite true that it is impossible from the evidence to say on what day the prisoner took any certain amount of any particular kind of bills, but that uncertainty must occur generally in such cases. All that is known is, that the prisoner, having from time to time large sums entrusted to his care, was found to be deficient in a large amount : that he at one time endeavoured to account for the deficiency by ascribing it wholly to an alleged robbery by others, but soon afterwards confessed that he had from time to time lent out large sums of money to various persons, all which he had concealed from his employers, and upon investigation of his account it was found that the deficiency was occasioned by these wrongful appropriations of his employers' money. The amount of £1439 15s. was concealed from view, by its appearing on the face of the entries as if that sum had been paid out to the Receiver-General upon a cheque drawn by him ; in other words, by just such a payment as it would have been in the ordinary course of the prisoner's duty to make on behalf of the Bank. The truth was, that that cheque had not been acquitted by him by means of such payment made out of the funds of the Bank, but was given to him by the Receiver-General to cover that amount of coupons, which he held on behalf of the Bank, and which he had given up to the Receiver-General on

receiving his cheque. If the proper entries had been made in his books, as has been explained, this would have appeared ; the cash account would not have been affected by the transaction, and a deficiency to that amount at least must then have been evident, because the prisoner has confessed that he had abstracted much more than that amount, and could not therefore have covered that amount by producing the money. It is true that there was no evidence whatever that the prisoner did on the same day on which he received and entered that cheque take out £1439 15s. or any sum of money, but it is immaterial whether he took exactly that sum on that day, or any day, and meant by that contrivance to keep the fact out of view, or whether, having before made away with the money, or meaning then to abstract it, and to lend it afterwards, he so managed his entries in his books as to leave that sum at his disposal for private purposes, without leaving the deficiency apparent on view of his cash book.

All this was for the consideration of the jury, and was, I think, properly put to them.

On the part of the prisoner several cases were cited, to the effect that a clerk or servant cannot be found guilty of embezzlement merely upon an apparent deficiency in his account, because that may have been occasioned in various ways, either from negligence or accident, without anything criminal having been done or intended. This is no doubt true. Those cases of this kind which I have referred to, are cases in which the clerk had to receive money from others and pay over to his employer ; and it has been held that the prosecutor must shew some certain sums received from certain persons and not paid over, in order that the prisoner may have fair opportunity of meeting some specific charge. And that is reasonable, at least when there is no such evidence as has been derived in this case from the prisoner's own confession.

But here it was not attempted to be disproved that the prisoner received certain sums from the Bank to be applied in a particular manner. From some suspicious circumstances occurring he is called upon to account for it. He is unable

to produce the money. At first he ascribed his deficiency to a robbery, of which there were certain appearances, saying nothing of his having himself misapplied the funds ; but afterwards he admitted that he had lent out money to a very large amount, in a manner which it is clear he had no right to do, and that £1700 of that which he had so lent was still out. This I think constitutes that evidence of fraudulent acts and fraudulent intention which are necessary to support the indictment, and brings this case within the authority of several cases which have occurred in England.

I refer to Hall's Case (Russ. & Ry. 463), Grove's Case (2 Moo. Cr. Ca. 447), Lambert's Case (2 Cox Cr. Ca. 209), Murphy's Case—in Ireland—(4 Cox 101), Murdock's Case (5 Cox 360), Goodenough's Case (6 Cox 207), Hodgson's Case (3 C. & P. 422), Jones's Case (8 C. & P. 288). These are not all cases in which the charge was held to be sustained, but by comparing them it will be seen that any in which the crime of embezzlement was held not to have been committed were very different in the circumstances from the present.

There was one fact proved upon the trial in this case which was very reasonably pressed as making in favour of the prisoner ; namely, that in two cases the prisoner had made advances to individuals out of the moneys intrusted to him, but for purposes with which such advances had no apparent connection ; and that such cases were afterwards so far sanctioned by the Bank, that they have in one instance ratified it, and in the other accepted repayment. The particular circumstances of these transactions were not fully brought out in evidence, but at any rate the Bank having allowed those sums to be repaid to them, is not a conclusive circumstance to prove that they were assenting to the liberty thus taken with their funds.

It afforded ground for an argument to be used with the jury, as we may suppose it was, but it could not prove that the prisoner had not on those occasions even done what was wrong : still less could it have the effect of licensing him to place the moneys of the Bank in any one's hands that he pleased.

My opinion is that the conviction of the prisoner upon the embezzlement charged in the first court was supported by the evidence, and should be affirmed.

BURNS, J.—*First*. There is nothing in the objection that the indictment in this case does not charge that the offence was committed *contra formam statuti*. Under the statute 4 & 5 Vic., ch. 24, sec. 46, similar to 7 Geo. IV., ch. 64, sec. 20, there is no doubt the omission would have been fatal. The 18 Vic., ch. 92, sec. 26, is similar to the clause contained in 14 & 15 Vic., ch. 100, of the English act; but section 25 in our act is an addition. No such section appears in the English act, but the clause in the English act is a reiteration of 7 Geo. IV., ch. 64, section 20, with the addition, *nor for want of a proper or formal conclusion*, besides some others. Our act omits reiterating sec. 46 of 4 & 5 Vic., ch. 24, and enacts, sec. 25, that “no indictment for any offence shall be held insufficient for want of the averment of any formal matter, or matter unnecessary to be proved.”

Besides this, the form given to the act in cases of embezzlement omits the words, “against the form of the statute,” and the 47th clause of the act says that indictments may be in the forms given; and in offences not enumerated in those forms, the said forms shall guide, so as to avoid surplusage and the averment of matters not required to be proved. I am unable to appreciate the argument that the forms given under the 18 Vic., ch. 92, do not apply to the acts chartering the Bank of Upper Canada. The 31st section of 6 Vic., ch. 27, is identical with the 40th section of 19 & 20 Vic., ch. 121. It is not material under which of the statutes this indictment may be considered to have been framed; for the statute 18 Vic., ch. 92, to amend the criminal law, being passed, and reciting that offenders frequently escape conviction by reason of technical strictness in matters not material to the merits of the case, enacts provisions which apply to the laws then in force, or that should be passed thereafter.

Secondly. The indictment charges that the prisoner received a certain sum of money *for and on account of the*

bank, and it is contended that must mean money paid by others than the bank to the prisoner, and not money entrusted by the bank itself to the clerk. No doubt that formerly was so; but it appears to me counsel have overlooked the provisions of the 20th section of 18 Vic., ch. 92, similar to 14 & 15 Vic., ch. 100, sec. 18, which I take to have been passed both in England and here, with the intention of doing away with the distinction whether the money or bank notes were received for, or on account of, or from the bank. The form of indictment given is, that a certain sum of money was received for and on account of the prosecutor; but the 20th section of the act says that it shall be sufficient, in any indictment in which it shall be necessary to make any averment as to money or bank notes, to describe the same simply as money, and in cases of embezzlement the indictment shall be sustained by proof that the prisoner embezzled or obtained any piece of coin, or any bank note, or any portion (of such money) thereof, although the same may have been delivered to him in order that some part thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. The enactment is an enlargement of that contained in the 39th and 40th sections of 4 & 5 Vic., ch. 25.

The general law being thus, and as respects the Bank of Upper Canada, the 40th section of 19 & 20 Vic., ch. 121, identical with the 31st section of 6 Vic., ch. 27, leaving no room for doubt what shall be considered as embezzlement in a case affecting the bank, we must apply it, as it is said in the 20th section of 18 Vic., ch. 92, *in any indictment*, when at the same time the form of an indictment for embezzlement is given, and we are told what proof shall sustain an indictment.

The case of *Sill v. The Queen*, in error (17 Jur. 207), does not apply to either of the points raised against the form of this indictment. In that case the judges held that since the statute 4 & 15 Vic., ch. 100 (English act), it was still necessary, in an indictment for obtaining money under false pretences, to charge whose property the money was, though it was no longer necessary to state the person whom it was intended to defraud. The statement to whom the property

belonged was not a formal defect, but was one which would require to be amended at the trial, and therefore a substantial defect after trial when not amended. The case is no authority bearing upon the case before us, because it appears to me the last statute has rendered the introduction of the words, *contra formam statuti* no longer necessary; and under the form of the indictment charging that the prisoner received the money for and on account of the bank, it may be proved that he received the money from the bank to be disbursed in the business of the bank.

With respect to the merits of the case, so far as the charge of the learned Chief Justice of the Common Pleas affected it with the jury, I am of opinion the view stated to the jury was correct; and that the jury, if they believed that the prisoner fraudulently inserted in his cash-book the entry of the amount of the check, for the purpose of making it be believed that he had advanced so much money from the funds entrusted to him, with a view of concealing to that extent his own misappropriation of the money, or, on the other hand, fraudulently omitted to enter that coupons had been delivered to the extent of the check for the same purpose, that was evidence for the jury to consider whether or not the prisoner had embezzled moneys of his employer to that extent. The King v. Grove (1 Mood. C. C. 447, 7 C. & P 635) decided that a general deficiency of moneys that ought to be forthcoming, and not accounted for, would be sufficient, but it was said in Regina v. Lloyd Jones (8 C. & P. 288) that Grove's case was a peculiar one, and that in embezzlement, as in cases of larceny, some particular or specific sum should be proved. The present case meets that proposition; for if the entry of the check was fraudulently made for the purpose of covering such a sum of money abstracted from the funds entrusted to the prisoner, that was quite independent of how his general balance might be, and it was quite clear that moneys equivalent to the check had been misappropriated. Whether such moneys were taken at the moment of obtaining the check, or at what time, of course the bank could not tell, nor do I think it was incumbent upon the bank to shew. The case most like the present that I have found is that of Re-

gina v. Goodenough, among the Crown Cases of 1853 (25 Vol. 572; 6 Cox C.C. 206). The prisoner was indicted for embezzlement before the Quarter Sessions at Exeter Castle, and it appeared he was employed to purchase skins for his master at different markets, his master furnishing him with funds from time to time by checks. The course of business was, that the prisoner kept a cash-book, in which he entered the moneys received, and charged the money paid out for skins every day, and accounted for the moneys on hand after each purchase to his master. He had no authority to purchase upon credit. However he did purchase on credit, and entered such purchases in the book as having paid the money, and appropriated an equivalent of the money so entrusted to him to his own use. The chairman of the Sessions charged the jury, that in the opinion of the court the prisoner took the money under such circumstances as amounted to a larceny, for that the money could not be considered as being out of the master's possession. The jury found the prisoner guilty of larceny, not of embezzlement. The recent statute in England does not appear to have been attended to, and the chairman of the Sessions seems to have looked upon the case as like many before it—that embezzlement was not the proper offence to charge where the money had been entrusted by the master, but that it amounted to a larceny. The conviction was held to be wrong. It is not said whether the prisoner could have been properly convicted of embezzlement or not, but I apprehend he might. If he had not made any entry at all of having paid out moneys, then it might have stood like other cases of not having appropriated the money to the use it was entrusted to him for, but making a false entry of it would be evidence to be considered whether he had embezzled it. The mere non-entry of the expenditure of money, according to the authorities, does not *per se* afford evidence of embezzlement, but a false entry respecting it may or not, according to circumstances, afford evidence for the jury; and I take it that in this respect it makes no difference whether the money be intercepted between a third person who pays to the clerk or servant for and on account of the master, or whether the

master pays it to the servant for a third person. The distinction, as appearing upon the evidence reported in the cases, is this : when a third person pays money to the clerk for his master, the mere non-accounting for it to the master will amount to embezzlement, if the receipt of it be denied or the like ; but when the master gives the money to the clerk or servant for a third person, the mere non-payment to the third person will not amount to embezzlement, nor will the want of entries to the master to account for the expenditure furnish evidence of embezzlement. But I take it that a false account or false entries of the expenditure of money will afford evidence from which a jury may say that a clerk who had money entrusted to him by his master has been guilty of embezzling it, just as much as not accounting for money received from others for the master will, if the receipt of it or the like be denied, afford evidence from which to infer embezzlement.

McLEAN, J., concurred.

Conviction affirmed.

HART AND THE MUNICIPALITY OF VESPRAS AND SUNNIDALE.

*By-law altering Union School sections—Omission of notice—By-law to levy rate—*13 & 14 Vic., ch. 48, sec. 18, sub-sec. 4—16 Vic., ch. 185, sec. 1—14 & 15 Vic., ch. 109, sec. 4.

The Municipality of Vespra and Sunnidale, before the 16 Vic., ch. 185, passed a by-law remodelling the school sections of those townships, which transferred to Union School section No. 3, created by the by-law, a part of Vespra which had formerly belonged to Union School section No. 4 of Vespra, Flos, Oro, and Medonte.

Held, that this was beyond the power of the municipality, and that the by-law was bad.

It appeared also that no notice had been given of the intended alteration, and on this ground as well the by-law was illegal.

Held, also, that as section No. 3 was illegally constituted, a by-law passed to raise money for a school-house erected there was also bad ; and the by-law in this case passed for that purpose was bad, too, for omitting to comply with the requisites under 14 & 15 Vic., ch. 109, sec. 4, of all by-laws creating a debt or contracting a loan.

Crooks obtained a rule *nisi* to quash by-laws Nos. 31 and 89, or that part of 31 which purports to detach lots 19 and 20, in the first concession of Vespra, and 19, 20, 21, 22, and 23, in the 2nd concession of Vespra, from Union School section No. 3 of Vespra and Oro, and to detach 31 and 32 in the 1st and 2nd concessions of Vespra from the Union

School section No. 4, of the townships of Oro, Medonte, Flos, and Vespra, and to include the same within Union School section No. 3, of Vespra and Oro—on the grounds,

That the municipality had no power to pass the said by-law, or to alter the limits of the two Union sections referred to in the by-law; and because all parties affected by the alteration of the said school sections were not duly notified of the intention to pass, or of the passing of that by-law, as required by statute 13 & 14 Vic., ch. 48.

Because that by-law (31) fails to recognise the school sections it refers to as *Union* School sections.

Because it takes effect from its passing, instead of from the 25th of December following, which is contrary to the statutes.

And as relates to by-law No. 89—

1st. Because the Union section No. 3 of Vespra and Oro, mentioned in it, was not legally constituted (by by-law No. 31).

2ndly. Because this by-law shews that the rate which it imposes was to meet the payment of a pre-existing debt of a municipality (or an instalment thereof), which was incurred in the erection of a school house within the said section; and it does not appear that the school trustees of the section desired that sum to be levied, or

3rdly. That any public meeting was called, as required by the 12th section of the statute (ch. 48).

4thly. And because the amount of the debt ought to have been stated in the by-law, and also the amount of the instalment and interest required to be paid from the rate imposed.

5thly. And because the by-law omits to provide, as it ought, rates to be levied in each year sufficient to raise a sum for paying the interest upon such debt, and for a sinking fund to pay off the principal within the period limited by the statute.

The by-law No. 31, of the united townships of Vespra, Flos and Sunnidale, enacted that, *after the passing of that by-law*, the township of Sunnidale should be divided into two school sections, the *second* section to comprehend lots Nos. 1 to 7, both inclusive, in the first six concessions, and lots Nos. 1 in the 7th, 8th, 9th, 10th and 11th concessions, and also lots north of the 11th concession situate between Nottawa-

saga and Flos.—The first school section to comprehend all the other lots in Sunnidale not set down in the second section.

Vespra to be divided into eight school sections as defined in the by-law; namely, No. 1 to consist of the first ward of this municipality.

No. 2 to consist of lots 4 to 20, both inclusive, of the first concession, from the little lake to 19 in the 2nd concession, and lots 16, 17 and 18 in the 3rd concession.

No. 3 to consist of lots 21 to 23, both inclusive, in the first concession, and Nos. 24 to 32, both inclusive, in the 2nd concession.

No. 4 to consist of lots from 33 to 40, both inclusive, in the 1st and 2nd concessions.

No. 5 to consist of lots from 21 to 24, west halves, in the 5th concession, also from 7 to 21 in the 6th, 7th and 8th concessions, also from 7 to 12 in the 9th, 10th, 11th, 12th, 13th and 14th concessions.

No. 6 to consist of lots from 3 to 20 in the 4th concession, and from 3 to 15 in the 5th concession, together with the east halves of lots from 14 to 21 of the 5th concession, and from 3 to 16 in the 3rd concession, and from 19 to twenty-four in the 2nd concession; also lots 4, 5, 6, and 7 in the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th concessions.

No. 7 to consist of lots from 11 to 21 in the concessions from the 9th to the 14th, both inclusive.

No. 8, a Union section with Flos, to consist of lots 1, 2, and 3, in concessions 3rd to the 14th, both inclusive.

And the by-law declared that the limits and boundaries of the several school sections as therein described, were confirmed and established as the boundaries of the several school sections. This by-law was passed on the 12th day of December, 1851.

The by-law No. 89, was passed on the 3rd of September, 1856, for raising a special rate for the then current year in the Union School section No. 3, in Vespra and Oro, for paying the first instalment and interest of the debt incurred in the erection of a new school house in the said school section; and it enacted, that there be raised, levied, and collected, from all the rateable property of the said school section,

whether of residents or non-residents, during the current year, 2¼d. in the pound on its assessed value, "for the purpose of paying off the first instalment and interest of the debt incurred in the erection of a new school house in the said school section." And that their clerk should prepare a collector's roll from the assessment rolls of the then current year, for the collection of the said rate on all the property of the said *school section* liable to the same, and that the collector should collect the rate according to the roll.

Nathaniel Hart, the applicant, swore that he owned the east half of 32 in the first concession of Vespra, which was in the Union School section No. 4 of Vespra, Flos, Oro, and Medonte, until altered by by-law 31 of the united townships of Vespra and Sunnidale: that he owned it before the by-law was passed, and still, and possessed and cultivated it; and before that by-law passed, was always assessed on the assessment rolls of the said township (Vespra) for that half lot: that the said lot No. 32 was by this by-law transferred from Union School section No. 4 to Union School section 3, but that he was never notified, and received no intimation whatever of such intended alteration, and was not aware of its passing until he learned it casually, and investigated the matter.

Notice or knowlege of this change, as regards union School section No. 4, was also denied on oath by Thomas Craig, who swore that he had been a trustee of that section continually from 1844 to the present time, and first heard of this by-law in 1855: that he had been secretary of Union School section 4, from 1854 to this time, for Vespra, Flos, Medonte and Oro; and in constant communication with the county or local superintendents of the four townships, and had reason to believe that they were not notified, nor any of them, before the alteration.

It was sworn also by N. A. Clifford, Esquire, that he was superintendent of schools for Oro in 1844, under the 7th Vic., ch. 29, and that under that act, he and the superintendent for Vespra formed the parts of the two townships near the Penetanguishene road into three sections, 2, 3, and 4: that No. 4 was also in union with Flos and Medonte: that Union

School section No. 3 of Vespra and Oro, extended from lots 19 to 30, both inclusive, in the 1st and 2nd concessions of Oro, and 19 to 30 in the 1st and 2nd concessions of Vespra: that Union School section No. 4 of Oro, Medonte, Vespra, and Flos, extended from 31 to 40, inclusive, in the 1st and 2nd concessions of Oro, and Vespra, besides embracing other lots: that these limits were confined by the then district councils as required by law: that in 1844, and two next years, the Union School sections 2, 3 and 4, continued to be regarded as Union School sections, with the bounds of 3 and 4 as stated: that in 1847 he was made county superintendent of schools for Simcoe, and so continued till the township councils were established in 1850, during all which time the Union School Sections remained unaltered, and were always recognised as the established boundaries of Union School sections 2, 3, and 4, and he never heard of an alteration until a considerable time after the passing of by-law No. 31: that in 1850 he was made local superintendent of schools for Medonte (which is in Union section 4 as before described), and that he had been since, and still was in that office: that he never had any notice, or intimation, private or public, of the intention of the municipality of Vespra, Flos, and Sunnidale, or of Vespra and Sunnidale, to disturb the boundaries of the Union sections 3 and 4, and he believed that no such notice was ever given to the Reeve of Medonte, or to the Reeve or local superintendent of Oro, or to the trustees of either of the two sections: that Flos was a distinct municipality; and he annexed a plan shewing that the by-law made such alterations as were complained of.

On shewing cause an affidavit was filed, made by the clerk and treasurer of the united townships of Vespra and Sunnidale, to the effect that the school house for Union school section 3 of Vespra and Oro was situated on lot 25 in the 1st concession of Vespra, and within the municipality of Vespra and Sunnidale: that in August, 1856, a requisition was presented to the municipality of Vespra and Sunnidale, by the trustees of Union School section 3 of Vespra and Oro, requiring them to levy a rate of $2\frac{1}{4}$ d. in the pound to pay the "first instalment on the said new school house in Vespra,

teacher's salary, and other expenses," of which requisition he gave a copy.

Stephen Richards shewed cause, and cited *Ness and The Municipality of Saltfleet*, 13 U. C. R. 408; *Ley and The Municipality of Clarke*, Ib. 433.

ROBINSON, C. J.—It appears to be clearly made out by the affidavits and other papers before us, that the by-law No. 31, passed in December, 1851, made an alteration in the limits of two Union School sections—the 3rd and 4th—by transferring to Union School section No. 3 a part of the township of Vespra, which had before belonged to Union School section No. 4.

This was an alteration of both those United School sections, adding to the one and diminishing the other, and it was an arrangement beyond the power of the municipality of the united townships of Vespra and Sunnidale to make.

According to the general school act, 13 & 14 Vic., ch. 48, sec. 18, sub-sec. 4, it is the reeves and local superintendents of the townships, out of parts of which the Union School sections are proposed to be formed, and no other authority, that can form or alter any union school section. The subsequent school act, 16 Vic., ch. 185, sec. 17, gives power to each township council, under the restriction referred to in that section, "to form such part of any Union School section as is situated within the limits of its jurisdiction into a distinct school section, or to attach it to one or more existing school sections, or parts of sections, as such councils shall judge expedient."

In the case of *Ness and the Municipality of Saltfleet* (13 U. C. R. 408) the effect of the provisions of the statutes in respect to this matter of the formation or alteration of union school sections was particularly considered; and according to the opinions expressed in that case, I take it that if this by-law No. 31 had been passed subsequently to the statute 16 Vic., ch. 185, which it was not, still the Township Council of Vespra and Sunnidale united, would not have had authority under it to do more than to take from either of the Union sections 3 or 4 such territory as was within their own particular municipality, and erect it unto a

separate school section of those two united townships, or add it to some one or more existing school sections, or parts of sections, within such townships.

They could not alter the limits of Union School section 3, which embraced land in Vespra and in Oro, which latter township was not within their jurisdiction, nor of the Union School section 4, which embraced land in Flos and Medonte, with which two townships the municipality of the united townships of Vespra and Sunnidale had nothing to do. The Council of Vespra and Sunnidale could have taken, under the statute 16 Vic., ch. 185, if it had been in force, any part of Vespra which had been united with land in Flos and Medonte in one section, in order to make it a section by itself, or unite it with any section or part of a section within their jurisdiction, but not in order to join it with parts of Oro, for which they had no power to legislate. And, at any rate, the question is not what they could legally have done after the statute 16 Vic., ch. 185, was passed, but what they could legally do under the statute 13 & 14 Vic., ch. 48, which was the only statute upon that subject in force when they passed the by-law 31.

I think, therefore, that though the parties are late in moving against this portion of the by-law, we are bound to quash it, when complained of on the strongest of all grounds, namely, that it is a law made by an authority which had no jurisdiction in the matter (*a*).

Then as to the by-law 89, which was passed in September 1856, I am of opinion that as the Union School section No 3 was illegally constituted—having a part of Vespra added to it by the by-law 31, which, for the reasons that have been urged, was in that part of it illegal—this other by-law 89, for raising a sum of money to pay for a school house erected

(*a*) *Quære*. Is not the effect of the by-law 31 inaccurately stated? It does no doubt alter the limits of the Union School Section No. 4 by taking from it certain lots in Vespra, but it does not appear to add those lots to Union School section 3, as is assumed in the judgment, and is also assumed in the rule *nisi* and in several of the affidavits filed. It makes them part of School Section No. 3, in Vespra alone. The by-law is such a one as it appears might have been passed after the statute 16 Vic., ch. 185, sec. 17, if proper preliminary steps had been taken; but being passed before that statute, and being at least an alteration of Union School section No. 4, it was held bad for that reason, and for the other reasons given in the judgment.

within that illegally constituted section, must fall with it. The effect of this may be hard, because all parties having apparently acquiesced so long in the arrangement made by the by-law 31, it was very material that a school house should be contracted for and built, and somebody should pay for it. But independently of the objection that the school section No. 3 is not a legally constituted section, there are defects in the by-law 89 which cannot be overcome. The effect of the by-law is to impose a tax on the inhabitants of a part of Oro, under a by-law passed by a municipality which does not include within its jurisdiction any part of that township, because that municipality has assumed, contrary to law, to constitute the school section for which the debt has been incurred, and in consequence it is not really a school section. But this by-law 89 seems to have been passed without any regard to the provisions of the statute 14 & 15 Vic., ch. 109, sec. 4, which expressly requires that in every by-law for creating a debt or contracting a loan, there shall be recited the amount of the debt, and the amount to be raised by the year for the payment of the debt and interest, and the amount of the whole rateable property of the municipality, according to the assessment returns for the next preceding year. If a by-law had been already passed authorising a loan to be raised for the purpose of paying for this school house, that ought to have contained all the above requisites, in which case there would have been no necessity for this by-law. I assume, this, however, to have been the first by-law upon the subject. We have heard of no other, and certainly this does not comply with the directions of the provincial statute.

It must therefore be quashed, and also so much of by-law 31 as alters the limits of the Union School sections 3 & 4.

BURNS, J.—The enactment contained in the 13 & 14 Vic., ch. 48, sec. 18, sub-sec. 4, is as follows: "Nor shall any step be taken towards the alteration of the boundaries of any school section, nor any application be entertained for that purpose, unless it shall clearly appear that all parties affected by such alteration have been duly notified of such intended step or ap-

plication." This notice, it appears, is a condition precedent to the council entertaining the subject, and must be given before it has jurisdiction to pass any by-law altering the school section. Now though the municipality might take back from another municipality the part of a school section which was comprised within its own boundaries, yet those parties who are to be affected by remodelling of the sections must have notice of the intended application. It does not appear to me necessary that such notice should be stated on the face of the by-law; but if it be the fact that it was given, so that the parties can have the opportunity of opposing it, or convince the council that some protection to those whom it may injuriously affect should be introduced, *that*, I think, is all that is necessary to confer the jurisdiction of entertaining an application to make an alteration. It is clear in this instance that the applicant and his brother, who are proprietors of lot 32 in the 1st concession of Vespra, had no notice of any application for, nor in fact any notice that an alteration in the school section to which they had formerly belonged had been made until several years after it was done. They, it appears, continued to treat themselves as belonging to the Union School section formed from the four townships in 1844, without any information that in 1851 they had been attached to another section. The only question that can arise upon their application to quash by-law No. 31, is whether the whole by-law shall be declared void or not. The objection does not appear upon the face of it, but is extrinsic, and in such case it has been held that a discretion remains with the court to quash either in the whole or in part, unless indeed it be shewn to have been passed under circumstances which, by the express terms of the statute, make it illegal, in which case I apprehend there is no discretion. It may be that even all the parties, except those mentioned, had been duly notified, or assented to the council making the alteration, but the question is whether we can allow it to stand *quoad* those parties, and quash it as respects the applicant. I thought at first we might do so, but upon reflection I am convinced we cannot put that construction on the act, and if it be susceptible of such a construction, it would lead to consequences never con-

templated. In the case of Hill and The Municipality of Tecumseth (6 C. P. 297) the applicant had notice served upon him, but it was made a question whether *duly* served or not. The applicant, however, was present when the discussion took place in the council, and when the by-law was passed, and opposed it by all means in his power. There was great delay in the making of the application, and under the circumstances the court thought proper to dismiss it. The facts are quite different from the present case, and do not establish a discretionary power to quash the present by-law so far as it affects one lot, and allow it to remain as respects the others. When the legislature has said that all parties affected by the alteration shall be duly notified, does it mean that part may be notified and part may not, and as affecting those who were notified the by-law may stand, and those not notified the by-law shall be quashed? It is quite true we should not entertain an application to quash a by-law on the part of one who was shewn to have assented to it, because that would be on the principle that he could not be a competent relator; nor should we entertain an application made by one who dissented from the alteration, if we saw that he either did oppose it, or had it in his power to do so, and declined, because in such case the council would be held to have jurisdiction, and their judgment is final; but if we entertain the present application, and confine its operation to the quashing of the by-law in part—that is, only so far as it affects lot 32, or those persons only who had notice—it would be in the power of any individual or number of individuals, for some motive or purpose of his or their own, to procure a by-law altering a school section to be passed upon notice to a few; and if any of the others complained, and it was quashed as respects those others, they who wished the alteration would reap the full fruit of their own act. The legislature could not mean that such should be the case, and the only proper way to exclude all improper requests being made to the council is to compel those who may desire or seek a change to give notice to all parties. It is not merely the interest of an individual to escape a school rate, if such be his interest in the application, which we have to

consider, but he has also an interest either in being united or disunited to other or from other persons who are to contribute with him, which has to be taken into account. The council therefore should have all parties before it, or called before it by notice served upon the parties, before it enters upon the consideration of the subject of an alteration, and unless all parties are duly notified it has no jurisdiction. The question we now have to deal with is whether the council had jurisdiction, not whether it is expedient for the court to quash the by-law in part, and allow it to stand in part; and on the question of jurisdiction, it must appear that all parties were notified of the intended alteration. For this reason by-law No. 31 is bad, and must be quashed.

I do not consider it necessary to enter into any consideration of the points made for quashing by-law No. 89, for it follows, as a consequence of quashing the by-law No. 31 for creating the school section, that no rate can be levied for the building of the school-house in a section which does not exist; and the rule to quash that also must be made absolute.

MCLEAN, J., concurred.

Rule absolute.

WELLS V. GZOWSKI ET AL.

Award—Remitting matters back—C. L. P. A., sec. 88.

Where an award is valid and unexceptionable on the face of it, the court will not refer the matters back in order that the arbitrators may state upon what grounds their decision was arrived at, and thus enable a motion to be made against it if illegal.

Galt moved, on the part of the defendants, for a rule to shew cause why the matters referred in this cause should not be remitted to the arbitrators for their re-consideration.

It was stated to be the object of such reference back, that the arbitrators should be required to state on what grounds—that is, on account of what heads of claim made by the plaintiff—they had made their award in his favor, in order that the defendants might be enabled to move against the award, if it should appear to be illegal or unjust.

The parties had agreed to a reference, on terms which were, on the 2nd of September, 1857, embodied in a rule of

reference made by *Hagarty, J.*, referring all matters in dispute between the parties in this suit, to the award of George Low Reid, of Hamilton, civil engineer, Oliver Mowatt, of the city of Toronto, barrister at law, and Lewis Wallbridge, of the town of Belleville, barrister at law, or a majority of them, the award to be made on or before the 1st of October then next; and it was therein ordered, by consent of parties that it should be lawful for the said arbitrators, or a majority of them, to find generally, and to decide all matters of law and fact between the parties, and that the order of reference might be made a rule of the Court of Queen's Bench, and that the said court might, if it should think fit, at any time, and from time to time, refer back to the said arbitrators the whole or any part of the matters referred to them, and upon such terms as this court should think proper.

On the 21st of September, 1857, the three arbitrators made their award, whereby they awarded that the plaintiff was entitled to recover in the said action; and that the defendant do pay to the plaintiff £5175 7s. 6d., for and in respect of the matters referred to their decision by the said order; and the award gave directions respecting the payment of costs, and the execution of mutual releases.

The defendants did not complain of the proceedings of the arbitrators in any respect, or question their desire or ability to determine impartially and justly the matters submitted to them; but they desired that the arbitrators should be made to declare whether, in making their award, they had treated the contract originally entered into between the plaintiff and defendants as at an end, in consequence of the arrangements which had been come to subsequently between the defendants and the Toronto and Guelph Railway Company, under which the defendants constructed the railway for the Grand Trunk Railway Company. The defendants also desired that the arbitrators should be called upon to state whether the sum which they awarded to the plaintiff, was so awarded as a compensation on account of the alleged difference of the material which he had to excavate in the execution of his contract from anything which was provided for in his contract with the defendants, or as a compensation

for a superior description of masonry alleged to have been required, and to have been executed by him, as compared with that which was specified in his contract.

The object of the defendants will be better understood by referring to the judgment given in this court between these parties in Michaelmas Term, 1856. (14 U. C. R. 553).

ROBINSON, C. J., delivered the judgment of the court.

What we have to determine is whether it is fairly within the intention of the condition in the rule of reference respecting referring back the matter to the arbitrators, or of the 88th clause of the Common Law Procedure Act on the same point, that we should remit the matters to the arbitrators for the purposes explained. We are all clearly of opinion that it is not, for that neither that condition in the submission, nor the clause referred to, was intended to be made any such use of. It would make an entire change in the law of awards if we were to hold otherwise. The case of *Fuller v. Fenwick* (3 C. B. 705) shews that where an award has been made, which is valid upon the face of it, when there is no defect to be supplied nor mistake to be corrected, nor irregularity in the proceedings, the award will not be opened, and the case remitted to the arbitrators to be considered upon the merits, upon any suggestion that the award is erroneous in point of law, or unjust to one of the parties.

But more especially we think we cannot properly refer it back for the purpose of obtaining from the arbitrators an explanation of the grounds upon which they have made their allowance to the plaintiff, or rather (which I suppose is what is meant) that they should set forth their grounds for the allowance in the award, after their reconsideration of the case, in order that the parties may see whether they have conformed to law and fact in their adjudication. If we should grant what is asked for in this case, a fair ground might be laid for asking in every case, where the award has been made, as it usually is, in general terms, that the matters should be remitted to the arbitrators in order that they might set forth in the award the grounds of their decision. Nothing could more tend to unsettle awards than such a course, and it

would be contrary to the principle on which the courts decline to hear from jurors a statement of the grounds on which they made up their verdict. In this case all questions of law and fact were in express terms submitted to the arbitrators, two of whom were gentlemen of high character and great experience in the profession of the law, and the third a civil engineer, chosen by the parties as their arbitrator in a matter which required a knowledge of that science. There is no allegation that both parties were not fully and fairly heard, no suspicion intimated of partiality, or misconduct in the arbitrators, nor of their incompetence to deal properly with the matters submitted to them. The reference is of all matters in difference, and the award is valid and unexceptionable on the face of it.

We see no ground, and can find no authority, for referring it back.

Rule refused.

GOING V. BARWICK.

Promissory note—Promise to pay in cash or mortgage.

A promise to pay a certain sum on a day named "in cash or mortgage upon real estate" is not a promissory note, not being an absolute promise to pay money, and it does not become a note by the maker's election to pay in cash.

Declaration.—For that the defendant, on the 21st of October, 1856, by his promissory note, now overdue, promised to pay to the Church Society of the Diocese of Toronto, or bearer, in cash or mortgage upon real estate, the sum of twenty-five pounds, with interest, six months after the date thereof, towards providing a fund for the support of a bishop for the western diocese of Canada, who should be appointed in pursuance of an election of the clergy and laity of the diocese; and the said defendant, before the said note became due and payable, and before the same was transferred as hereinafter mentioned, to wit, on the 27th of December, 1856, elected to pay the said promissory note in cash, and in writing then agreed so to do; and the said Church Society afterwards, and before the said note became due, for good consideration, to wit, the value of the said note, payable in

cash, according to the said agreement of the defendant, transferred the said note to the plaintiff, who then became and was and is the lawful bearer and owner thereof; but the defendant did not pay the same.

Demurrer.—1st. That the instrument mentioned and declared on in the said declaration is not a promissory note.

2ndly. That the said instrument or note mentioned in the said declaration is void, the said Church Society of the Diocese of Toronto having no authority by law to take or accept notes, or agreements, or instruments in writing, for the payment of moneys for the support of a bishop for the western diocese of Canada.

Read, for the demurrer, cited Stor. P. N., Secs. 17, 18, 22; Hill v. Halford, 2 B. & P. 413.

Connor, Q. C., contra, cited Byles on Bills, 70; Hogg v. Marsh, 5 U. C. R. 319.

ROBINSON, C. J.—I think the instrument declared on is not a promissory note, being a promise to pay a sum of money, or do something else—namely, or to secure the sum by mortgage: in other words, not an absolute promise to pay money.

I can find no authority for holding that in such a case, if the defendant should have made an election—that is, should have declared verbally, or by some independent writing, that he elected to pay the money—that would thenceforward make it a promissory note.

A promissory note, to make it valid under the statute, of course must be a good note *per se*., and cannot depend for its validity upon some alleged collateral agreement not visible on the face of it, and which may or may not be capable of proof.

MCLEAN, J.—It is quite clear that the instrument declared on is not a promissory note within the meaning of the statute 3 Anne, ch. 9, inasmuch as it is not for the *payment of money absolutely*. The maker promises to pay a certain sum to the Church Society, or bearers, in cash, or mortgage on real estate, for a specific purpose, at a particular day. If called upon on

that day he had the option to give a mortgage on real estate, payable at some future day, instead of paying in money, so that the holder or bearers could not insist on being paid in cash; and the fact alleged, that the defendant undertook in writing, after the time stated for the paying or the giving of a mortgage, to pay in cash, cannot affect the question. That undertaking forms no part of the instrument, and cannot be incorporated with it to give it the effect of a note.

The case of *Hill v. Halford*, in error (2 B. & P. 413) is analogous to this case. The instrument declared on was a promise to pay on the sale and produce, immediately when sold, of the White Hart Inn, St. Alban's, and the goods, &c., a certain sum of money; but it was held not to be a note, though it was averred in the declaration upon the promise that the White Hart Inn, goods, &c., were sold before the action was commenced.—*Chitty on Bills*, 148, 526. In the case cited by Dr. *Connor* on the argument, *Hogg v. Marsh* (5 U.C.R. 328), the instrument was for the payment of a specific sum in money absolutely, and the payment could be enforced. It was payable seventeen months after date, without interest, or three years and five months after date, with two years' interest; so that at the expiration of the latter period, the defendant could be compelled to pay according to the tenor of the instrument.

The defendant having, by the terms of the instrument declared on in this case as a promissory note, the option of giving a mortgage when the time of payment arrived, the holder could not insist on receiving money, nor could he, as the bearer, insist on the other alternative, the giving of a mortgage. If the instrument is anything it is an agreement to pay money or to give a mortgage for a specific purpose on a particular day, but as an agreement it is not transferrable in the same manner as a promissory note.

BURNS, J., concurred.

Judgment for defendant, on demurrer.

MURPHY V. SCARTH.

Lease—Security for rent—Condition precedent.

Defendant leased to the plaintiff certain premises, for three years from the 1st of May; and the plaintiff covenanted that, on or before said 1st of May he would give to defendant two good and sufficient securities for the performance of the covenants in the lease on his part.

Held, that the giving such security was a condition precedent to the plaintiff's right of possession under the lease.

The declaration alleged that the defendant, by his deed, dated 5th of January, 1857, demised and leased to the plaintiff certain premises, to hold for three years from the 1st of May, 1857: that the plaintiff, by the said deed, amongst other things set out in the declaration, covenanted that he would, on or before the said 1st of May, 1857, give to the defendant two good and sufficient securities for the performance of the covenants above set forth by the plaintiff; and the defendant, by said deed, covenanted that the plaintiff paying the rent and performing the covenants should quietly enjoy said premises during the term. The plaintiff averred, that notwithstanding he did on the said 1st of May, 1857, tender to the defendant two good securities for his, the plaintiff's performance of the said covenants, according to the terms of the said deed, and was ready and willing to pay the said rent and perform the covenants, yet the defendant, although often requested, did not permit the plaintiff to have quiet possession of said premises, but kept, and still keeps him expelled therefrom.

Plea.—That the plaintiff did not, on the 1st of May, 1857, as is alleged, tender to defendant two good securities for his, the plaintiff's, performance of the said covenants, according to the terms of said deed.

Demurrer.—That the plea contains no answer: that the covenant to which it is pleaded is not a condition precedent to be performed by the plaintiff before his right to the premises could become perfect; and the defendant's only remedy for non-performance of said covenant is by action.

J. R. Jones, for the demurrer, cited Archb. L. & T. 281; Dawson v. Dyer, 5 B. & Ad. 584.

Eccles, Q. C., contra, cited Friar v. Grey, 15 Jur. 814, 5 Ex. 584, 26 Eng. Rep. 27.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plea is good, and the defendant therefore entitled to judgment on the demurrer. The defendant did not mean to trust to the personal responsibility of the plaintiff, but stipulated that before the time that the term was to commence from which the plaintiff was to hold, to wit, on or before the 1st of May, 1857, he should give to the defendant two good and sufficient securities for the performance of the covenants on his part, which were contained in the lease. When that day came, the plaintiff was to be ready with his sureties; and that he so understood the contract is plain, for he avers that he did on the 1st of May tender two sufficient sureties according to the deed, but that the defendant would nevertheless not suffer him to go into possession.

The defendant traverses the tender of sufficient securities as alleged by the plaintiff, and the plaintiff submits to us that this is no answer to his action, for that he was under no necessity of tendering security as a condition precedent to his obtaining possession. But we take the ruling principle here to be that laid down by *Tindal* C. J., in *Stavers v. Curling* (3 Bing. N. C. 368), "That the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way." I refer to the case of *Kingston v. Preston*, cited in the note to *Douglas* 689, and to *Glazebrook v. Woodrow* (8 T. R. 366). We think it is clear here that the defendant did not mean that the plaintiff should become his tenant, unless he gave him security for his rent, and for the performance of his covenants generally. The stipulation that such security should be furnished on or before the day when the term was to commence shews that very clearly.

I know no book in which this branch of the law, respecting conditions precedent, is better laid down than in the second volume of an American work, "*Robinson's Practice*."

which, though entitled "The Practice of Courts of Justice in England and the United States," is in fact a compendious digest of the principles of the law.

Judgment for defendant on demurrer.

GRACE V. WHITEHEAD.

Ejectment—Notice of title—C. L. P. A., sec. 222.

Where in ejectment the plaintiff claimed as assignee of a mortgage made by defendant, and defendant by his notice claimed under a deed from the mortgage. *Held*, that defendant might show that he was an infant when he executed the mortgage.

EJECTMENT for lot No. 161 on the north side of Quebec Street, in the town of Goderich.

The plaintiff claimed as assignee of a certain mortgage made by the defendant to Robert Thornberry, bearing date the 12th day of June, 1856.

The defendant, besides denying the title of the plaintiff, claimed to be entitled to the premises under and by virtue of a deed of conveyance made to him by one Robert Thornberry, bearing date the 12th day of June, 1856.

At the trial, before *McLean, J.*, at Goderich, the plaintiff proved the execution of the mortgage mentioned in his notice, and the assignment thereof to him, by the subscribing witnesses.

Mr. J. F. Boulton then addressed the jury for the defendant, and stated to them that the defence to be urged was the infancy of the defendant at the time of the execution of the mortgage to Thornberry.

The plaintiff's counsel objected that it was not competent for the defendant to set up such a defence under the notice attached to his appearance, the only defence stated in the notice being *under a deed from Robert Thornberry*; and that if infancy were allowed to be urged as a defence the plaintiff must be taken by surprise, and wholly unable to rebut it.

The objection was held to be well founded, and the jury were directed to render a verdict for the plaintiff; but the

defendant was permitted to go into evidence of infancy at the time of the execution of the mortgage, and leave was reserved to move to enter a verdict for the defendant if the court should be of opinion that such a defence could under the circumstances be set up.

The defendant then proved, by his father, that he was born on the 17th of March, 1836, and consequently was not of age on the 12th of June, 1856, the date of the mortgage.

J. F. Boulton obtained a rule *nisi* to enter a verdict for defendant, pursuant to leave reserved.

Christopher Robinson shewed cause, and cited *Harper v. Lowndes*, 15 U. C. R., 430, 435.

Phillipotts supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

We assume from the report of the case that the jury found the defence of infancy to be true. The plaintiff had sold the land in question to the defendant, and had taken back a mortgage to secure the purchase money. Now, on bringing ejectment upon his mortgage, the defendant sets up as a defence that he was under age when he executed the mortgage.

It is a defence apparently the most unjust possible, since the effect would be that the defendant keeps the land and evades the payment of the price, so far at least as this security is necessary for enforcing payment. A gross case of imposition upon the infant might excuse such a defence, but that would not seem very likely, as the defendant wanted but a few months of being of age; and at any rate the defendant, if he repudiates the mortgage, should now reconvey the land, or offer to do so, which perhaps he has done.

Upon the leave reserved, we think the plaintiff suing upon the mortgage must fail, for we hold the defendant to be clearly entitled upon his notice, given under the 222nd clause of the Common Law Procedure Act, to take all objections to the plaintiff's title, though the result of any such objections may be to shew inevitably that the title is in himself, the defendant, and a title different in its nature from that of which

the defendant may have given notice. Besides, here the defendant in his notice stated his claim to be under a conveyance from Thornberry, and that is shewn to be so. The plaintiff to be sure endeavoured to shew that title no longer existing by reason of the subsequent mortgage, but when he fails to do this on the account of the invalidity of the mortgage, then the defendant's title derived from Thornberry remains, as if there had been no such deed signed by him, and that is the very title of which he gave notice.

Rule absolute.

BALDWIN V. BENJAMIN.

Chattel mortgage—Contingent liability—Form of affidavit—13 & 14 Vic., ch. 62—20 Vic., ch. 3.

A. mortgaged his property to B. for the payment of a debt due by C., and C. to secure A. from loss, gave him a chattel mortgage conditioned to be void on his paying the amount of the debt either to A. or B., or indemnifying A. against all loss from his suretyship. This was registered under the 13 & 14 Vic., ch. 62, on an affidavit, in the form prescribed, that C. was "justly and truly indebted to A." in the amount of the mortgage. It was objected that such mortgage was void as against the plaintiff, a creditor of C., because the affidavit could not have been made consistently with the facts; but

Held, first, that A. could properly make the affidavit under the circumstances; and secondly, that if he could not, then the mortgage, not being within the statute, would not have required registration at all.

This was an interpleader issue, to try whether certain goods taken in execution under a *fi. fa.* from this court against the goods of Mary Higgins at the suit of this defendant, were or were not the property of the present plaintiff.

At the trial at Toronto, before *Draper*, C. J., a verdict was taken for the plaintiff, subject to the opinion of this court.

The plaintiff claimed under a bill of sale made on the 21st of November, 1856, which was admitted to have been made *bona fide*, and upon good consideration. It recited in substance, that the plaintiff had become security for Mary Higgins for a debt due by her to Ross, Mitchell & Co., of £290, and then having been called upon by them to pay the money, he had given them a mortgage upon his real estate, conditioned to be void upon his paying the money at certain days mentioned: that he had called upon Mary Higgins in consequence to give him such security as should indemnify

him for all payments he might be compelled to make to Ross, Mitchell & Co., and for all loss and damage to which he might be put by reason of having become security for her; and Mary Higgins thereby assigned to the plaintiff certain goods and chattels specified in a schedule referred to (which it was admitted were the same goods afterwards seized by the sheriff), subject to a proviso, that if she should pay to the plaintiff the £290, for which he had given security to Ross, Mitchell & Co., in three equal half-yearly instalments, with interest, or if she should pay to Ross, Mitchell & Co. the said sum of money and interest, or such smaller sum as might be due by her to Ross, Mitchell & Co., or if she should keep the plaintiff indemnified against all claims and demands of Ross, Mitchell & Co., on account of her said debt, and against all loss by reason of his having given security as aforesaid, then the mortgage to be void. The mortgagor was to retain possession till default, with liberty to sell any of the goods that constituted her stock-in-trade, accounting to the plaintiff monthly for the proceeds; and she covenanted that she would well and truly pay the said moneys, and indemnify the plaintiff as she had engaged to do.

This mortgage was registered with the clerk of the county court, upon an affidavit made in the form prescribed by the statute, that Mary Higgins was justly and truly indebted to the plaintiff in the sum of £290: that the mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and not for the purpose of protecting the goods against the creditors of the mortgagor.

The point to be determined was whether a mortgage given on the terms and for the purpose that this was, could be made effectual by registering it under the statute. It was contended it could not be, for that the affidavit required by statute and which was made in fact in this case, could not properly be made under such circumstances.

C. S. Paterson, for the plaintiff, cited *Parker v. Roberts*, 3 U. C. R. 114; *Douglass v. Mayer*, 5 C. P. 377; *Swayne v. Ruttan*, 6 C. P. 399; *Heward v. Mitchell et al.* 11 U. C. R. 625.

Hector Cameron, contra, cited *Beaumont on Bills of Sale* 83.

ROBINSON, C. J.—This case was to be determined solely upon a view of the acts which were in force when the mortgage was given; namely, 12 Vic., ch. 74, and 13 & 14 Vic., ch. 62; and cannot be affected by the later statute, 20 Vic., ch. 3, which does not apply to mortgages executed before the passing of that act, as this was.

The objection is not that the affidavit which was made is in other terms than the statute 13 & 14 Vic., ch. 62, requires, but that it is an affidavit which could not properly be made consistently with the facts of the case. There is no force, I think, in the objection. The deed in question is no doubt a chattel mortgage, given in good faith, upon a legitimate transaction of business, such as frequently takes place, when one man having assumed the debt of another, and rendered himself liable for it, takes a security for his own indemnity. If the statutes 13 & 14 Vic., ch. 62, and the previous act, do not apply to such cases, then the security cannot be held to be void for want of compliance with the directions of those statutes, and we could not hold that the statute 12 Vic., ch. 74, or 13 & 14 Vic., ch. 62, apply to such a case as the present, if it is impossible under the circumstances that the mortgagor could properly make the affidavit which the latter of those statutes requires. No chattel mortgage could be registered without the affidavit required by the 13 & 14 Vic., ch. 62, and it would be repugnant to reason to hold that a chattel mortgage is within the act, so as to make registry with the county clerk indispensable to its validity, and yet that it is a mortgage of such a kind, that the affidavit positively required by the statute to be made, in order to registration of mortgages, cannot be properly made or legally received for the purpose of registering it. "*Lex non cogit ad impossibilia*;" and if this really be a mortgage which cannot be registered according to the directions of the statute, it should follow that if it be otherwise legal, it cannot be held invalid for want of such registration. But I do not consider that there is really any difficulty. All statutes for the prevention of fraud are to be liberally construed. The object of the act was to guard against pretended incumbrances, not to render impossible any transactions un-

tainted with fraud, which were always before permitted, and which are necessary in the transactions of business. We must either look upon this mortgage, which is one of an ordinary character where a counter security is required to be taken, as being of a description not within the statute, and therefore not necessary to be registered; or we must uphold the registry of it, which has been made upon such an affidavit as the statute exacts; and taking it either way, the transaction, which is admitted to have been a perfectly fair one, must be upheld. To have registered it upon any other form of affidavit than that which the statute absolutely requires would have been an idle ceremony. The plaintiff has made the debt his own when he gave his mortgage to Ross, Mitchell & Co. for the payment of it, and the provision in the mortgage that Mrs. Higgins might either pay the money to him or to Ross, Mitchell & Co. does not of itself make it less a debt due to the mortgagee. I think, by a fair construction of the statute, which is made for the suppression of fraud, that the statute was meant to apply to such a case, as well in regard to the form of affidavit as to the enacting clause, and that if it cannot apply for both purposes it cannot apply at all, and so the mortgage would not be void for non-registry. But besides, here all is done that the statute requires, and we could not, therefore, hold it void for non-registry, for it has been registered upon such affidavit as the law requires.

BURNS, J.—The mortgage in this case having been executed before the passing of the statute 20 Vic., ch. 3, it has been argued that because the third section of that act has enabled mortgagees who are liable for the mortgagor to take a security by way of mortgage as a counter security, therefore it was not the law before that statute that such could be done, at all events to have any operation against creditors proceeding by execution against the goods. It has not been urged that a mortgage of that description is *per se* invalid as against an execution creditor, but that the statute 20 Vic., ch. 3, sec. 3, providing for such mortgages being taken, and

providing for an affidavit stating the facts corresponding with the terms of the mortgage, is a legislative interpretation of the statute 13 & 14 Vic., ch. 62, and that under this latter statute the mortgage in question is void as against the execution creditor. The affidavit made in the present case corresponds with the terms of the last mentioned act, but the mortgage itself shews that it was intended as a counter security to the plaintiff in consequence of his being security for the mortgagor. The argument for the defendant is, that if the affidavit of the mortgagee had stated the facts truly, then the statute would not have been complied with, and the affidavit being prescribed by the statute implies that the mortgage which should be under the statutes 12 Vic., ch. 74), and 13 & 14 Vic., ch. 62, must be to secure a debt due from the mortgagor to the mortgagee, and not to secure a liability, which perhaps may never become a debt as between the parties. If this argument be sound, the inevitable consequence of so holding would have been that an alteration in the law was effected by those two acts, in this respect, that a mortgage made to one who was a surety, to operate upon goods and chattels as a counter security, was void *eo instante* as against the creditors of the mortgagor. It is quite clear the first of these statutes had no such operation, for no description of affidavit was prescribed for the mortgagee to make, and no other affidavit was required than of the execution of the instrument. The second statute amended the other, by enacting that the mortgagee should make affidavit that the mortgagor was justly and truly indebted to him, the mortgagee. Independently of the statutes the security would be legal, and I fail to see that the legislature had any intention to alter the law.

The question then is simply this, whether a mortgagee who stands in the position that this plaintiff does is justified in making the affidavit in the terms he has done, and whether a mortgage containing the terms this mortgage does, being duly filed, will enable the plaintiff to hold the goods against an execution creditor. There was nothing to be left to the jury, for no question is raised against the *bona fides*

of the transaction, and it was the intention to secure the plaintiff upon the terms contained in the deed as against an overhanging liability.

The security to the plaintiff *per se* I think good, and not avoided by operation of the statutes, and I do not see why the plaintiff may not make the affidavit in terms of the statute, as he has done; and if the affidavit had stated the terms of the deed instead of stating that the mortgagor was justly and truly indebted, I should have been inclined to think it might be held within the equity of the statute, and so a compliance.

The third section of the recent act, it will be seen, not only provides for counter security to be taken by way of mortgage, but it enables parties to take securities of this description to cover advances to be made; and it may be that the legislature, when prescribing the affidavit to be made by the mortgagee, and which applies to both classes of cases, considered that some people might have scruples of conscience in making the affidavit prescribed by 13 & 14 Vic., ch. 62, where the mortgage was executed as a counter security, and therefore provided for a relaxation.

Judgment should, I think, be entered for the plaintiff.

McLEAN, J., concurred.

Judgment for plaintiff.

ANDERSON V. GALBRAITH.

Plaintiff and A. made a bet upon a horse race, and deposited the money with defendant as stakeholder. The bet was illegal, as neither of the parties owned either of the horses, and they were not running for any other stake. A. won, and the defendant paid over the money on his order, having been previously notified by the plaintiff not to do so. Held, that the plaintiff might recover back the amount from defendant as money had and received.

The declaration was upon the common counts.

Plea, never indebted.

At the trial, at Hamilton, before *Hagarty*, J., it appeared that the action was brought to recover back money deposited with a stakeholder on the event of a horse race. A bet was made between the plaintiff and one Perry, that a horse called "Bones" would beat any other horse that could be brought,

and the race was to be subject to the decision of judges who should be afterwards appointed. The race was run, and the judges who were appointed decided that "Bones" had won it, and upon Perry's order the defendant paid over the money to another person. Before doing so, the plaintiff notified him not to pay it over. The defendant was not aware who owned either of the horses. It appeared that neither the plaintiff or defendant owned either horse, nor did Perry own the horse called "Bones." The horse which ran against "Bones" was called "Red Bird," and was owned by one Vannorman, and "Bones" was owned by one Raglan, in Philadelphia.

The learned judge directed the jury according to the law as laid down in *Sheldon v. Law* (3 O. S. 85), there being no evidence that the horses ran as in a match race where any thing was run for; and the plaintiff accordingly had a verdict for £125, the amount deposited by the plaintiff, leave being reserved to move for a nonsuit.

Start obtained a rule to shew cause why the verdict should not be set aside on the ground that it was contrary to law, in that the plaintiff had no legal right to recover, and also on the ground that no demand was shewn for the money; or if demand made it was too late, and because the defendant had assented to pay the money over before notice. He cited *Challand v. Bray*, 6 Jur. 626; *Evans v. Pratt*, 6 Jur. 152.

Sadleir shewed cause, and cited *Sheldon v. Law*, 3 O. S. 85.

ROBINSON, C. J., delivered the judgment of the court.

We think the plaintiff was entitled to recover back his deposit, and that the verdict is right as it stands.

There can be no question that the wager was an illegal one. The case of *Sheldon v. Law* (3 O. S. 85) governs this in that respect. The horses in this case were not owned by either of the parties making the bet, and it was not a match race such as the statute allows.

Then it was proved that before the defendant paid over the money to the alleged winner he was desired by the plaintiff not to pay it.

The case of *Hastelow v. Jackson* (8 B. & C. 121) is a

direct authority to shew that under such a state of facts the plaintiff can get back the amount from the stakeholder, notwithstanding the latter has paid over the deposit, because, having paid it over in disregard of the plaintiff's directions to the contrary, he paid it at his peril. That case was scarcely so plain a case in favour of the plaintiff as the present is.

Rule discharged.

MYNDERT HARRIS V. BUNTIN AND MCPHAIL.

ALMOND HARRIS V. BUNTIN AND MCPHAIL.

Assignment in trust for creditors—Liability of assignees for money received.

The declaration charged that the plaintiff, having recovered judgment against A. & Co., had seized and was about to sell their goods under a *fi. fa.*, and in consideration that the plaintiff would withdraw his writ defendants promised to pay the amount. A count was added for money had and received.

It appeared that A. & Co., being indebted for rent, and three executions, of which this was one, having issued against them for other claims, they made an assignment to the defendants of all their goods, in trust *out of the proceeds* to pay the landlord, and these executions according to their legal priority, then to pay two preferential creditors named, and lastly to divide the surplus money among the other creditors executing the assignment. It was put in at the trial by the plaintiff, and it was proved that the defendants had received moneys under it, but no promise was shewn by them except what was contained in the deed, in which it was recited that the defendants had agreed to pay the claims above mentioned out of the proceeds of the property assigned, if sufficient.

Held, that the plaintiffs could not recover : that the first count was not proved, the only promise made being that contained in the deed, which was to pay out of the proceeds of the goods ; and upon the second count, defendants, as trustees, could be liable only in equity, or if at law in a special action on the deed.

In the first of these actions the plaintiff declared that he had recovered judgment against Hay & Thatcher for £371 4s. 7d. in this court, and had sued out a *fi. fa.* thereon against their goods, by virtue of which the sheriff of Northumberland and Durham had seized their goods, and was about to sell the same to satisfy the writ, the amount with interest and costs being £372 19s., and that, in consideration that the plaintiff would withdraw his writ of *fi. fa.* from the sheriff, and abandon the seizure of said goods, and forbear to sell the same under the writ, the defendants promised to pay him the said £372 10s. : that the plaintiff did withdraw, &c., yet the defendants did not pay, &c.

Counts were added for money had and received, and on account stated.

The defendants pleaded *non assumpsit* and payment.

In the other case, of Almond Harris against the same defendants, the declaration stated that the plaintiff had recovered judgment against Morris and Hay, in this court, for £261 7s. 2d., and had taken out a *fi. fa.* against their goods: that the sheriff had seized, and was about to sell in order to make the amount required, being in all £263 2s. 4d., and that in consideration that the plaintiff would withdraw his execution, abandon the seizure, and forbear to sell the goods, the defendants promised to pay him the said £263 2s. 4d.

The plaintiff averred performance of the condition on his part, and that the defendants had not paid the money.

Pleas the same as in the other case.

At the trial, at Cobourg, before *Richards, J.*, the facts appeared to be these: Morris & Hay being a good deal indebted, and these two executions being out against their goods, and another at the suit of a third plaintiff for a smaller sum, and their landlord having also a claim for £46 against them for rent, their other creditors were desirous of preventing their goods from being sacrificed at sheriff's sale, being satisfied that if otherwise sold they would produce a considerable sum above these four claims, and it was agreed that an assignment should be made by Morris & Hay, of all their goods, debts, &c., to these defendants Buntin & McPhail, in which provision should be made for paying these particular demands in full, and for dividing any surplus rateably among the other creditors. Accordingly, on the 29th of December, 1854, they executed a deed of assignment to these defendants, in which they recited that their goods had been seized under several executions at the suit of these plaintiffs respectively, and one of Messrs. Partridge & Co., and were also liable to a certain claim for rent, which claims altogether amounted to about £713 10s.: that the goods seized appeared upon appraisal to be worth about £1153 16s. 3d.: that it was desirable that the goods should not be sacrificed at sheriff's sale, "but that the said writ, and the claims of

the execution creditor should be paid off according to their legal priority, without subjecting the property to any such sacrifice." They recited also that they were indebted besides to other creditors whom they were unable to pay in full: that it had been proposed that they should make a general assignment of all their goods and effects mentioned in a schedule annexed (including the goods seized) to those defendants "upon trust for the benefit of Peter Robertson (the landlord of Morris & Hay) and the said several execution creditors who were named; and lastly, to divide any surplus among the other creditors who shall execute the assignment, rateably, in proportion to the amount of their debts." And whereas (the deed recited) "The said parties of the second part," (namely, these defendants, each of whom was a partner in one of the two firms whose debts were to be paid next after those of the landlord and the execution creditors) "on their own behalf, and on behalf of their respective firms, have agreed to pay the said claim for rent, and the said execution claims, and to pay off and discharge the same according to their legal priority, also to discharge the said Hay & Thatcher from the claims of the said Miller & Co., and Buntin, McPhail and Co., the preference creditors respectively, *with, and from, and out of the proceeds of the said property, debts, and effects of the said parties of the first part, provided the same shall be sufficient for such purposes.*"

And then the indenture of assignment witnessed, that in performance and consideration of said agreement, the said Hay & Thatcher assigned to these defendants (the second party in the instrument) all their goods, effects, debts, property, &c., mentioned in a schedule annexed, upon the following trusts, *by and with the consent of the several parties interested in the said rent and execution claims, respectively*, that they, the said A. B. and R. M. (the defendants) do and shall, as soon as conveniently may be, make sale and dispose of the same, &c., in such a manner as to them shall seem fit, and shall collect the debts, &c., and that they shall stand possessed of the moneys to be received from such sales, upon trust, in the first place, to pay and discharge therefrom the said rent, and several execution claims, according to their

legal priority, &c. The deed then provided for the manner in which the moneys that might remain should be disposed of, and contained the usual clauses as to reimbursement of expenses attending the trusts, &c.

The deed was signed by Hay & Thatcher, and by these defendants, and also by Miller & Co., Buntin, McPhail & Co., and one creditor, but it was not executed by either of the two execution plaintiffs who had brought these actions.

It was proved by the deputy sheriff that he seized Morris & Hay's goods under these plaintiffs' executions in December, 1854: that the writs were afterwards withdrawn, and the goods delivered up to Buntin. He could not state the value of the goods. Hay was put in possession of the goods by the assignees, and was to sell them and account for the proceeds. The defendants admitted on the trial that they had received certain sums of money under their trust. It was not shewn that the execution plaintiffs received any assurance or promise from the defendants apart from what was expressed in the deed, to which the plaintiffs were not parties.

The learned judge held that there was nothing to support this action: that the defendants could only be called to account in a court of equity as trustees; and the plaintiffs were nonsuited, with leave to move.

C. S. Patterson obtained a rule *nisi* accordingly. He cited *Tilson v. The Warwick Gas Light Co.*, 4 B. & C. 962; *Carden v. The General Cemetery Co.*, 5 Bing N. C. 253; *Edwards v. Bates* 7 M. & G. 590.

A. Crooks shewed cause, and cited *Edwards v. Lowndes*, 17 Jur. 412; *Pardoe v. Price*, 16 M. & W. 451.

ROBINSON, C. J.—It is certain that the special count was not proved. There was no evidence of a promise by the defendants otherwise than is stated in the deed, that is to pay out of the proceeds of Morris & Hay's goods, whereas, the promise stated is to pay without any such qualification or restriction.

Then the only other question at the trial was whether the plaintiffs could recover on the count for the money had and received.

There is nothing whatever to shew a claim in law or equity on the part of the plaintiffs against the defendants except the contents of the trust deed. The execution plaintiffs, it is shewn, gave up their hold of the goods, and allowed them to pass into the hands of the defendants, and we have no ground whatever for supposing that they did this upon any other expectation or assurance than that they should be paid in the order the deed points out; and the fair conclusion from the evidence is, that although they did not execute the deed, they had a knowledge of the arrangements that had been made, and were acting in accordance with it when they directed the goods to be given up by the sheriff.

If the assignees could be sued at law by those entitled to distribution, still the action would have to be brought against them upon the sealed agreement, and it would be necessary to aver and shew that they had received moneys sufficient to pay the plaintiffs' claim, after discharging the landlord's claim for rent, and making all other disbursements which were entitled to be paid first.

The report of the case cited, of *Carden v. The General Cemetery Company* (5 Bing. N. C. 253) so far as it does apply, shews that it was considered necessary to aver there that the defendants had money for which they were bound to pay the plaintiff his legal demand upon satisfying all prior claims. No such evidence appears in this case. But neither that case, nor the other which was cited from 7 M. & G. 590, can govern the present. They are quite different in their nature. There had been no trust created by deed in either of them.

We discharge both rules.

BURNS, J.—I think the nonsuit is right, and that the plaintiffs' remedy is not for money had and received. With respect to the special count there was no evidence to establish that the defendant promised to pay the amount of the plaintiff's execution if he would withdraw from the seizure. The plaintiff felt it was necessary to use the deed of assignment made by his debtor, and therefore put it in, and established that the defendant and his co-trustee had received

moneys under it. On looking at the deed the first money to be made is to be applied in payment of the rent due by the debtors, and then, secondly, to pay the execution creditors, among which class is the plaintiff; and, thirdly, to pay the creditors who should become parties to the deed. The conveyance, as appears by the deed, was made of the property to the defendants with the consent, as it recites, and as the fact is proved to be, of the plaintiff, in trust that they should, as soon as conveniently might be, make sale and dispose of the same in such manner as to the trustees might seem fit, and for the best prices that could be obtained. With respect to the creditors who were to be paid after the executions are satisfied, there can be no question that the defendants stood in a purely trustee character. The plaintiff no doubt had no occasion to have withdrawn his execution, and allowed the debtor to have placed the property in the hands of trustees, but nevertheless it is the fact that he did so; and the simple question is, whether having done so he does not preclude himself from suing the trustees at law as for money had and received to the plaintiff's use, unless the trustees by their conduct, or acts, or admissions, give the plaintiff a right of action. But for the deed in this case the defendants had no right whatever to sell the property of the debtor, and the receipts of the proceeds of the sale was strictly as trustees under the deed. To sustain the plaintiff's position, that he had a right to maintain this action, he must contend that the very instant the defendants received the money their character of trustees ceased, and the money in defendants' hands was the legal instead of the equitable property of the plaintiff.

The plaintiff was not entitled to the first moneys to be made, for that was to be applied to the payment of the rent. The deed provides for the payment of the executions according to priority, so that there was something to be ascertained by the trustees before paying the amount over; and although the plaintiff may have been perhaps the first execution creditor, yet that fact would not alter the defendants' character of trustees. When a trustee may be liable to be sued is well put by *Rolfe, B.*, in pronouncing the judg-

ment of the court in *Pardoe v. Price* (16 M. & W. 451): "When, indeed, there is no trust to execute except that of paying over money to the *cestui que trust*, the trustee, by his conduct, as, for instance, by admissions that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the *cestui que trust* for money had and received, or for money due on account stated."

So far as the case stands upon the effect of the defendant having received the proceeds of the debtor's estate in the character of a trustee for one purpose, it must be held that he has received all moneys in the same character, and that position will remain between the parties until altered by something which may be done by the defendant, which will give the plaintiff a right of action for money had and received, but nothing appears at present to change that position. The plaintiff may obtain full relief in a court of equity, and oblige the defendant to pay over the balance due on the execution, but that will not authorise us to treat the money in his hands as the plaintiff's money. A court of equity will deal with the defendant in the character of trustee, which we cannot do.

MCLEAN, J., concurred.

Rules discharged.

NEWBERRY V. STEPHENS ET AL.

Taxes—Extension of time for collection—Duration of collector's authority—His right to appoint a bailiff—Costs—Tender.

The time for levying a school tax in the city of Kingston, imposed by by-law in December, 1855, was extended by resolutions of the city council, under 18 Vic. ch. 21, sec. 3, until the 1st of August, 1856, and again, on the 22nd of December, 1856, to the 1st of March, 1857.

Held, that the collector, who was the same person for both years, might distrain between the 1st of August and the 22nd of December, 1856, although no resolution extending the time was then in force: *McLean, J.*, dissenting.

REPLEVIN, for two silver table-spoons, eight tea-spoons, and a sugar tray.

Plea—Not guilty, by statute.

At the trial, at Kingston, before *Hagarty, J.*, it appeared that the defendant Stephens was collector of taxes for the city of Kingston, and Conley acted as his bailiff. £1 8s.

was claimed from the plaintiff for school tax, which he tendered to Conley, who would not receive it without the costs. The things were afterwards seized, and were replevied by the plaintiff.

It seemed that two assessments were made for school purposes in 1855, each for the same amount; and the plaintiff, thinking that he was charged with the same tax a second time, at first refused to pay it. Afterwards, finding his mistake, he tendered it to the constable, who demanded also the costs of the warrant of distress which had issued, 5s., which the plaintiff refused to pay. The bailiff in consequence seized the goods, which gave rise to this action.

The school trustees, in August, 1855, had called upon the municipality of Kingston to levy £1,600 for school purposes, and in order to comply with this request a by-law was passed on the 19th of December, 1855, authorising a rate of 7d. in the pound on the property assessed for 1855. The time for levying the money was extended by the corporation from time to time, by resolutions, till March, 1857, the last postponement being by resolution passed on the 22nd of December, 1856.

The time had been last extended before that to the 1st of August, 1856; and the plaintiff contended that there being no resolution passed after that day until the 22nd of December, 1856, there was no authority to levy at the time when his goods were seized, namely, on the 5th of December, 1856.

The roll for 1855, *exclusive* of school taxes, was made up on the 6th of September, 1855, and certified on the 6th of December following. It showed the plaintiff to be assessed for property amounting to £48, which, at 7d. in the pound, made the school tax £1 8s. This school tax was added in the roll after the 11th of December, 1855, and before January, 1856, as the city clerk stated. On the 14th of December, 1855, the collector had received from the plaintiff £6 4s., being his rates for general purposes for 1855, on the same property.

On these facts a verdict was rendered for defendants, leave being reserved to the plaintiff to move to have the verdict entered in his favour for 10s.

Wallbridge, Q. C., obtained a rule *nisi* accordingly. The grounds taken were, that the defendants had no right to take possession of the goods, the time allowed therefor having expired ; and that the plaintiff had tendered to the defendants, before seizure, the amount for which they distrained.

Richards shewed cause.

The statutes bearing upon the question are referred to in the judgments.

ROBINSON, C. J.—This action is an unreasonable one on the part of the plaintiff, for if the necessity for a distress was occasioned, as it seems to have been, by his refusing to pay what he was really liable for, and if his refusal can only be excused by his having himself fallen into an error, he should surely have been content to bear the natural consequences of his own mistake, and should have paid for the warrant, rather than get up a law suit about five shillings costs. He contended that the distress was illegal, first, because there was no power to distrain on the 5th of December, 1856, on which day the seizure was made, the last postponement before that being to the 1st of August, 1856, which day had long passed. This is assuming that the effect of the statute 18 Vic., ch. 21, sec. 3, is to disable the collector for the year from distraining during his year after the 14th of December is passed, unless while there is a resolution of the municipality *in force* extending the time for collecting to some day which has not yet expired. There is much in the language of the clause referred to to favour what the plaintiff contends for, and I am not sure that one or both of my brothers do not take that view of the effect of the clause.

I do not for my own part take that to be the correct view. To understand the question we must look at the statutes 13 & 14 Vic., ch. 48, sec. 12, sub-sec. 2, and sec. 24, sub-secs. 6 and 7 ; to 16 Vic., ch. 182, secs. 39, 42, 46, and 47 ; and 18 Vic., ch. 21. We shall there see that the collector of taxes has, as a general rule, to make up and return his collections on the 14th of December in each year, and that in his return, if he has not collected all the sums set down in the collector's roll, he is bound to state how it happened that he did not

collect them; and then, the obstacle being known, it is pointed out in the act what steps the municipality may take for enforcing the payment of those arrears which the collector has been unable to levy. But as it would be more convenient to have the taxes collected in the ordinary manner by the collector, whenever that was still practicable, the legislature provided a means for leaving that open to him, by permitting him, under the sanction of the municipality, to defer making that final report, which in general he is to make on the 14th of December, to such further day or days as they might appoint, in order that he might not be *functus officio* for that year in regard to his collections, by having given in his final report, and stated his inability to collect such arrears, as he would be bound to state; which final statement of his would necessarily, under the Assessment Act, leave the payment to be enforced by another and less convenient proceeding.

But with all deference for the contrary opinion, I cannot think it reasonable to hold the legislature to have intended by these enactments, that so long as the collector has not returned his roll, he is not at liberty to go on and levy when he finds a distress, although the 14th of December may have passed, or any other day which has been given him for making up his return.

The intention of the act, I think, is not to leave the collector under the absolute necessity in all cases of concluding himself on the 14th of December from any further discharge of his duty, by making up and finally returning his roll, and thus putting the matter out of his hands. It could never have been meant to restrain him from collecting whatever he can collect before he has sent in his final return. If, for instance, a collector, without any authority from the council to postpone his return beyond the 14th of December, should delay making it till the 25th of the month, he could, I think, distrain in the mean time for any arrear of taxes, which he had either neglected to levy, or could not find the means of levying before.

The rate which has given rise to this question was imposed by a by-law, which was not passed till the 11th of December, 1855, and could hardly have been collected before the 14th

of December in that year, when the collector in the ordinary course was to make his return ; and it was not proved at the trial, indeed, that the rate had been placed on the collector's roll until after the 14th of December, 1855. It was sworn that it was put in between the 11th of December (the passing of the by-law) and the 1st of January, 1856, but whether before or after the 14th of December does not appear. The 3rd section of 18 Vic., ch. 21, does not seem to apply to this case, for the defendant Stephens, who was collector for 1856, did not after the 14th of December in that year return this rate of £1 8s. as a sum which he could not collect, or had failed or omitted to collect, for in fact he had seized goods before that day ; and assuming that this was a sum which it was the duty of the collector for 1856 to collect, he was at liberty to go on and collect it on the 5th of December, 1856, when there was no order of the council any longer in force postponing the collection.

As to the second ground—that the collector or his bailiff could not distrain after the amount had been tendered, which he was authorised to levy—that is no doubt true, but do the facts of the case support the exception ? That depends on the question whether there was a right to insist upon the plaintiff paying the charge for the warrant. Clearly it was the duty of the bailiff to levy the costs in addition to the rate, but it has been argued that the collector ought not to have given a warrant to any one else, but should have distrained himself, in which case no warrant would have been necessary. The statutes do not in terms direct that the collector shall do the duty of a bailiff in distraining ; and in my opinion he could employ a bailiff for that purpose, and the plaintiff therefore was liable to the charge which that occasioned, and so did not, in tendering the bare rate, tender all that was necessary for stopping the distress, for he should also have tendered the costs of the warrant. Wherefore, in my opinion, this rule should be discharged, and the verdict stand for the defendant.

McLEAN, J.—The defendant Stephens was collector of taxes in Kingston, in 1855. The collector's roll for ordinary

city purposes was made up by the city clerk, as stated by him, about the 6th of September, 1855, and must have been delivered to the collector soon after, as the notice to the plaintiff demanding payment of the sum of £6 4s., the amount of his assessed taxes for 1855, bears date on the 10th of September. A demand had been made on the 4th of August, 1855, by the board of school trustees, for the sum of £1600, to be raised for school purposes. That demand was in sufficient time to have admitted of the school rate being entered upon the collection roll before it was given to the collector, but nothing was done till the 11th of December, when a by-law was passed, imposing a rate of 7d. in the pound on all assessed property for the purpose of raising the required amount for schools. The amount of rate so imposed was entered on the collector's roll between the 11th of December and the 1st of January, but at what particular time does not appear. On the 14th of December the plaintiff paid to the collector, as appears by his receipt, the amount of tax for ordinary city purposes; and from the fact that the school rate was not then demanded, it may be inferred that such rate was not then entered on the roll in compliance with the provisions of the 39th section of 16 Vic., ch. 182. By the 46th section of that act it became the duty of defendant Stephens, as collector, to return his roll to the city chamberlain on or before the 14th of December, 1855, unless the *municipal council* of the *county* appointed some other day, not later than the 1st of March then next, for that purpose.

The roll was not returned by the collector on the 14th of December; and it does not appear that the *municipal council* of the *county* appointed any other day for the return, nor does it appear that the city council of Kingston, as authorised by the 3rd section of 18 Vic., ch. 21, passed any resolution or took any steps to "*authorise and empower* the collector, or any other person in his stead, to continue the levy and collection of the unpaid taxes" till the 22nd of April, 1856, when the time for such collection was extended to the 1st of July following. From the fact stated by the city clerk on the trial, that the city council extended the time on the 30th of June, 1856, up to the 1st of August,

and then again from the 22nd of December, 1856, up to the 1st of March, 1857, it is evident that some portion of the rates, for some cause or other, remained unpaid, and that these extended periods were considered necessary to enable the proper officer to collect the amount. Between the 1st of August and the 22nd of December there was no resolution of the city council "*empowering* the collector, or any other person in his stead, to continue the levy and collection of the unpaid taxes;" so that during that period the *power* was suspended. By the 46th section of 16 Vic. ch. 182, the time for returning the collector's roll on the 14th of December might be changed by the *county* council to any day not later than the 1st of March following. Then, by the third section of 18 Vic., ch. 21, in the event of any of the taxes remaining unpaid on the 14th of December, or on such other day in the year as may have been appointed by the *municipal* council of the *county*, the city council had power by resolution to authorise and empower the collector, or *any* other person in his stead, to *continue* the levy and collection of such unpaid taxes in the manner and with the powers provided by law for the general levy and collection of taxes. What the resolution of the city council was, authorising the collector to proceed with the collections between the 30th of June and 1st of August, 1856, does not appear; but assuming it to be sufficient for the purpose, it is pretty obvious that by limiting the period for collection to the 1st of August, the council expected the work to be completed by that time. At all events, they did not, on the 30th of June, give to Stephens any time beyond the 1st of August to collect the amount of his roll. Without any resolution, then, of the city council, authorising the levy and collection of the taxes unpaid, the defendant Stephens, by his bailiff, seized the property of the plaintiff on the 5th of December, 1856, for the school rates, and certain costs claimed to be due for the warrant and seizure, and removed the same from his possession. In thus acting, it appears to me he acted illegally, and that the plaintiff was entitled to replevy his goods.

If it was competent to the defendant to proceed in his character of collector after the 1st of August, without any

power or authority from the city council, but such as his first appointment gave him, then the provisions of the third section of the 18 Vic., ch. 21, are unnecessary and superfluous, and the city council of Kingston, by their several resolutions extending the time up to the 1st of August, 1856, only gave to the collector Stephens an authority and power which he had before. But it is manifest that the legislature considered that any collector would be *functus officio* as to any taxes unpaid on the 14th of December, or at such other time, not later than the 1st of March, as might be appointed by the *county* council; and as it might happen that the *county* council might omit to appoint any time, it was intended, by the third section, to place it in the power of the municipality interested in the collection to proceed by *resolution*, notwithstanding such omission. When the period limited by the resolution of the 30th of June had expired, the defendant Stephens could not be certain that he, though he had acted as collector, would be longer continued in that duty by the city council, for the statute enabled that body by resolution to *authorise* the collector, or *any other person* in his stead, to continue the levy and collection. Till that power was exercised, and while it was uncertain whether the collector or another in his stead would be chosen by the council, the collector could not, by continuing the act, deprive the council of the right which they had to appoint another to discharge those duties which he had failed to perform within the period allowed to him.

It appears to me that by the proper construction of the 46th section of 16 Vic., ch. 182, every collector is bound to return his roll by the 14th of December, and to pay over all moneys collected, unless some further time is given by the county council, not later than the 1st of March, and that at the time appointed for such return the collector ceases to have any further power to collect. But if any taxes remain unpaid, the municipal council interested in their collection may, if they think proper, authorise the collector, or they may authorise any other person, to proceed to collect such arrears; and in such case the person authorised, whether the collector or another, may proceed in the manner and with

the powers provided by law for the general levy and collection of taxes.

By the 76th section of 16 Vic., ch. 182, it is provided that every collector, before entering upon the duties of his office, shall enter into a bond with two or more sureties for the faithful performance of the duties; and by the 79th section if any collector shall refuse or neglect to pay to the person legally authorised to receive the same, the sums contained in his roll, or duly to account for the same as uncollected, a summary mode is provided for levying from the goods and chattels of such collector, or his sureties, such sum as may remain unpaid or unaccounted for. A warrant may be issued by the treasurer of the municipality, or city chamberlain, within twenty days after the time when such payment ought to have been made. There must of course be a certain time for the payment over of moneys, and *that* time, as it appears to me, is the 14th of December in each year, under the statute, unless the time is extended by the county council, or authority given by the municipality interested to continue the collection. When the time for collection was extended to the 1st of August the time for payment was fixed for that day, and the collector and his sureties might have been proceeded against for neglect in paying over the amount of the roll, or to account for the same as uncollected.

On these grounds I am compelled to differ from the Chief Justice and my brother Burns, and I do so with considerable hesitation, as there is undoubtedly a great deal of weight to be attached to the views taken by them of the question which has been brought before us.

There is no doubt that if entitled to levy for the amount of tax in arrear, the collector was also entitled to levy for costs, as it was clearly shewn that the taxes had been demanded, and that they were unpaid upwards of fourteen days after they were so demanded, in which case the 42nd section of 16 Vic., ch. 182, authorises the collection with costs. The refusal of the plaintiff to pay a sum of 5s., which appears certainly not an unreasonable amount, if costs were chargeable has given rise to this action, and has no doubt occasioned to both parties very considerable expense, which can-

not be reimbursed, whatever the results of the suit may be ; but it often happens that persons, rather than submit to what they conceive to be a wrong, will incur any amount of expense, and in that case both parties may be influenced by that feeling, each believing that right is on his side ; and the fact of there being a difference of opinion in this court on the subject, may perhaps shew that each of the litigating parties is not without some foundation for the views which they severally entertain. I am of opinion, under all the circumstances, that the rule should be made absolute.

BURNS, J.—It appears from the facts proved that the municipal authorities did extend the time for payment of the taxes of 1855 several times in the year 1856. On one occasion the extension was to the 1st of August, 1856, and again, on the 22nd of December, 1856, the time was extended to the 1st of March, 1857. Between the 1st of August and the 22nd of December, 1856, the defendant levied the rate, namely, on the 5th of December.

The third section of 18 Vic., ch. 21, gives the municipal council authority from time to time to extend the time in which the collector may make his return, and may continue the levy and collection of the taxes. The question in truth is, when and at what precise moment does the collector become *functus officio*. Suppose the municipal council does not extend the time beyond the 14th of December in each year does he on that day become incapable of exercising his functions as collector? I have no doubt he may receive moneys, on account of taxes after that day, provided he has not made his return, and may include the payment of them in his roll and return, but whether he may take the compulsory powers with which he is invested is another question. If he does so after that day, I do not see what restriction there may be as to time, unless his authority is held to be co-extensive with his possession of the roll. The 28th section of 12 Vic., ch. 81, enacts that the municipality shall, so soon as conveniently may be after their own election, nominate and appoint the assessors and collectors, who it is declared shall hold the appointment until the third Monday in January, in the year

next after the appointment, and until the municipality shall appoint the new assessors and collector. I apprehend the collector does not become *functus officio* then until the expiration of this period, and if that be the case, the different provisions of the statute for the enlargement of the time for his making his return are in favor of the collector, and, if the municipality does enlarge the time, also in favor of the rate-payers provisionally; but they have no other effect, and so long as the officer continues in office, his authority to collect the rates continues so long as he retains the roll, which is his authority, so far as the amount is concerned, for collecting the rate. This, I take it, applies to the case of rates expected to be paid within the year for which the collector has been appointed. The present case is that of rates unpaid for 1855, carried over to 1856, and placed in the hands of the same collector, who was also appointed for the year 1856. His term of office would continue until the third Monday in January, 1857, and until the municipality appointed a new collector. The collector's authority to distrain is given by the 42nd section of 16 Vic., ch. 182, and other sections. No time is mentioned when he shall do so, except that he cannot until after fourteen days have expired from demand made. In this case it appears that the rolls for 1855 were not completed until the 11th of December in that year, and if the collector must make demand fourteen days before he could distrain, if he were *functus officio* on the 14th of December, he could not have levied any of the taxes of that year. The effect of carrying them on to the next year by extension of time gave the collector of that year an authority to collect them. I apprehend he was not *functus officio* until the third Monday of January, in 1857, and that his levying them during his term of office, and while he had as yet made no return of his roll, which may be considered his authority while he remains in office, it was not open to the plaintiff to say his authority to levy these rates expired on the 1st of August, 1856.

I look upon the provisions respecting the collector making his return by the 14th of December in each year, or any other time the municipal council may extend the time to,

not as determining his authority to collect the taxes, but that his authority to collect the taxes on the roll is co-extensive with his term of office, provided in the interval he has not returned the roll.

I think the rule should be discharged.

Rule discharged, *McLean*, J., dissenting.

TAYLOR v. STRACHAN.

The plaintiff leased a house from defendant, and a dispute arose as to the liability for some repairs, which, as the jury found, had been done by the plaintiff's orders, but on the understanding with defendant's agent that defendant should pay. Defendant refused to pay; and the plaintiff, being sued for the work done, defended the action, on the ground that the defendant only was liable to the contractor; but a verdict was rendered against him, which he paid, with costs. The plaintiff thereupon sued defendant. *Held*, that he could recover from defendant the amount of such verdict only, not the costs.

ASSUMPSIT.—The first count alleged that the plaintiff, being about to rent from defendant a certain dwelling house in the city of Toronto, the defendant agreed to pay for such reasonable repairs to the said house as should be made at the instance of the plaintiff: that the plaintiff did rent the said house, and that certain reasonable repairs were made in and about the said house, at the instance of the plaintiff, and by the consent of the defendant: that the defendant did not pay for the said repairs upon request, and that by reason of such non-payment the plaintiff was sued and prosecuted by one George Netting, for a large sum of money, being the amount of the said repairs made and done by him, and the said George Netting recovered the sum of £92 in respect thereof, which the plaintiff had paid, and the plaintiff had also paid the sum of twenty-five pounds for his costs of defending the said suit, which moneys the defendant had not repaid to him.

Second count, for money payable by the defendant to plaintiff for money paid by the plaintiff for the defendant at his request.

Third count, for money due by defendant to the plaintiff on an account stated.

Pleas.—1. As to the first count, that defendant did not promise as in the said count is alleged.

2. As to the second count, and the causes of action therein stated, except as to the sum of five pounds and ten shillings parcel thereof, that defendant never was indebted.

3. As to the causes of action in the second count, except as to two pounds and ten shillings parcel thereof, that defendant satisfied and discharged the same by payment before action.

4. As to the sum of £2 10s., parcel of the money claimed in the second count, the defendant brought the same into court, and said that the said sum was enough to satisfy the claim of the plaintiff in respect of the matters therein pleaded to.

The plaintiff took issue on the defendant's first, second, and third pleas; and, as to the last plea, replied that he accepted the sum of £2 10s. in satisfaction of the causes of action in the introductory part of the plea mentioned.

At the trial, at Toronto, before *Draper*, C. J., the plaintiff claimed not only the amount actually paid for repairs, but also the costs which he had incurred in defending the suit of Netting against him for such repairs.

It appeared in evidence that in August, 1855, the plaintiff being about to remove from Quebec to Toronto, and being desirous to rent a house, telegraphed to Mr. Dixon, the agent of defendant, on the 6th of August, that he would take a certain house in St. George's Square, respecting which Dixon on the same day had communicated to him by telegraph that reasonable repairs would be made, and that the rent was £125 and taxes. On the 7th of August the plaintiff wrote to Michael Keating, the head messenger of the Legislative Council, stating that he had taken the house: that Dixon consented to do reasonable repairs, which he (the plaintiff) wished to have completed certainly by the 1st of September. He desired Keating to go over the house, and to give him a full description of the whole, and he added, "As I shall move my family at all events during the present month, I beg of you to see that all needful and proper repairs are made to the house and premises." Keating stated in evidence that he went over the house, and found it in a very bad state of repair: that he had applied to defen-

dant's agent, Dixon, and shewed him the letter received from the plaintiff, and that Dixon said, "very well, to go and employ any person he chose to do the repairs, and he would see all right, but to employ a particular coloured man to white-wash:" that he asked him (Keating) whom he would employ, and that he (Keating) told him he would employ Netting to do the carpenter's work, and the painter at the parliament house to do the painting; and that these persons were employed by Keating to make repairs. On cross-examination he stated that he had taken the house by the year, but nothing was said about the rent: that he exercised his own judgment as to what repairs he should order, and that Dixon left it to him to order what he thought necessary.

A witness who worked at the repairs gave evidence of certain work done by him under Keating and Netting's directions. He said that Keating told him what to do in all respects.

The amount of Netting's bill for repairs, £66 17s. 11d., was admitted, but not the defendant's liability. The plaintiff's costs in the suit of Netting against Taylor for the repairs were shewn to amount to £24 2s., which the plaintiff paid to Netting's attorney, together with the verdict. The cost of defence as taxed were shown to amount to £22 10s., making in all £113 9s. 11d., which the plaintiff claimed to recover against the defendant.

For the defendant, Joseph Dixon, defendant's agent, was called. He stated that the plaintiff's son first spoke to him about the house, and that the defendant had referred him to him as his agent: that he then told him what the rent would be, and desired him to put on paper what he required to have done: that young Mr. Taylor declined renting the house till he should see his father; and that a few days after a telegraph was received from the plaintiff at Quebec, to which he, Dixon, returned the answer produced, "Reasonable repairs; rent, £125, and taxes:" that he heard no more respecting the house till Keating called upon him about a fortnight after, and showed him the letter from the plaintiff of the 7th of August, 1855: that he then told Keating to go and examine the house, and to let him know what repairs he wanted: that

there were some broken planks in the yard, and that a sliding door was out of order : that he then asked Keating, " what about the rest of the house ? " and Keating said it was passable : that he told Keating that he would whitewash the lower part, and lay a hearth below, and get the planks in the yard done : that he, Dixon, sent for the white-washer, and that he did the lower part of the house, and that he referred Keating to one Edwards, near St. George's Church, who would lay the hearth and the planking in the yard ; but that he never authorized the repairs contained in Netting's bills, and that it was not true that he told Keating to get Netting to do repairs : that he, Dixon, had been through the house, and that as the plaintiff was only to take it for a year, he thought it in good repair for such a term, and that the repairs which he had ordered would amount to from \$7 to \$9, after paying for the whitewashing.

The learned Chief Justice directed the jury that the case depended on whether defendant, by his agent, authorised the repairs to be made at his expense : that that was a question of fact for them to decide on the evidence : that if the defendant was liable, he must pay what the repairs were fairly worth, and interest from the time that the plaintiff had paid the value of them ; but that the defendant was not liable for the costs of the action brought by Netting against the plaintiff, for that there was no liability, express or implied, on defendant's part to pay them. The jury were asked, if they found for the plaintiff, to separate the costs from the amount of repairs and interest ; and leave was reserved to the plaintiff to move to add the costs to the value of repairs, if the court should think him entitled to them.

The jury found a verdict for the plaintiff for £69 16s. 11d., being the amount of repairs and interest ; and they found the amount of costs paid by the plaintiff to be £46 12s.

Eccles, Q.C., obtained a rule to shew cause why the verdict should not be increased, pursuant to leave reserved. He cited *Smith v. Compton*, 3 B. & Ad. 407 ; *Stratton v. Mathews*, 3 Ex., 49.

Galt shewed cause.

MCLEAN, J.—The plaintiff was sued by Netting for work, &c., done in making repairs to a home rented from the defendant, and in that action he contended that he was not liable, and that the work had been done wholly on the responsibility of the defendant. The jury, however, found that the work had been done under the direction of Keating, the plaintiff's agent, and that he ordered what he thought was necessary in the way of repairs. The interference of the defendant, and his agent Dixon, with any of the work was not shewn, nor was it in fact shewn that they were aware of the nature or extent of repairs being made under the orders and direction of Keating. It was sworn on that trial, as on this, by Keating, and contradicted by Dixon, that Keating had received authority from Dixon to have the repairs made which he might consider necessary.

The verdict in that case against the present plaintiff having been moved against in term, all the facts as proved on the trial were necessarily laid before the court, and may therefore he judiciously noticed. The court, finding from the evidence in that case that Netting had done the work under the direction of Keating, who was entrusted by the plaintiff to "see that all needful and proper repairs were made to the house and premises," refused to disturb the verdict, especially as the liability of the present defendant to Netting was not satisfactorily shewn.

The plaintiff having been compelled to pay Netting the amount of his account with costs, now seeks in this action to recover back from the defendant the amount so paid, alleging the agreement of the defendant to pay for such reasonable repairs to the house as should be made *at the instance of the plaintiff*; and he alleges that the defendant did not pay on request, by reason of which he was sued, and compelled to pay a large amount to Netting. Now the evidence does not shew that defendant undertook, either by himself or his agent, to pay the party who made the repairs, nor that there was any privity between them: on the contrary, the verdict and judgment rendered in favour of Netting establish that the work done was in fact done for the plaintiff, and at his

request. If so, then the plaintiff was bound on the completion of the work to pay for it, and he was not at liberty to defer the payment till the defendant should pay him, nor to shift the responsibility from himself to defendant. If entitled to receive the amount from defendant, that should not and could not be allowed to interfere with the contract between Keating and Netting; and the costs or damages occasioned to the plaintiff by his breach of contract with Netting cannot be charged against the defendant as arising out of a breach of contract on the part of defendant.

The declaration indeed does not allege that the defendant agreed to pay *to the plaintiff* such reasonable repairs, nor does it state that it was by reason of the non-payment *to the plaintiff* that the plaintiff was sued by Netting; and it may have been intended to leave it open to claim damages on account of the plaintiff being subjected to an action by reason of the non-payment to Netting; but there being no obligation resting on the defendant to pay anything to Netting, the plaintiff can have no right to claim damages on that account. The present verdict seems to rest entirely on the evidence of Keating, that Dixon, defendant's agent, told him to go on and get the repairs made, and that he would see it all right. It is expressly denied by Dixon that he ever gave such authority; and it seems difficult to imagine that, acting as the agent of another, Dixon could have left it to any tenant or his agent to make any repairs which he chose without limitation as to amount. But the verdict, so far as the amount of repairs is concerned, is not resisted. The only part of the plaintiff's claim to which defendant now objects is the costs, and considering that these were brought upon the plaintiff by his own breach of contract with Netting, and not by the defendant's breach of contract with him, it appears to me that the defendant is not liable for them. He will now have to pay the costs arising from his own breach of contract with the plaintiff; and that, and the amount of repairs, for which a verdict has been rendered, seem to me to be all that he can be called upon to pay in this action. In effect the plaintiff alleges that the defendant ought to have paid him for the repairs in time to enable him

to pay Netting, and that as he did not do so he must pay the costs, by way of damages, of the suit which the plaintiff allowed Netting to bring against him, or which was brought against him by reason of his not getting the money from defendant; but this cannot be urged as a legitimate ground for the recovery of damages. A creditor cannot sue his debtor for damages because he has been exposed to costs by the failure of the debtor to pay money at a particular time: all he can exact is the payment of his debt: so here, all that the plaintiff has a right to is the amount of the debt or sum paid for repairs, and the costs of this suit.

The cases to which reference was made in the argument, of an accommodation acceptor of a bill being entitled, when the cause of action is specially stated, to recover from the party for whose benefit the bill is drawn, the costs of suit which he has been compelled to pay, are not analogous to the present case. There, there is a contract, express or implied, that the party accommodated will pay the bill, and if he does not do so an action may be maintained on the contract, and all the damages arising from the default may be recovered; but in this case there was no contract, express or implied, to pay the plaintiff's debt to Netting, and the plaintiff should have paid it himself, if it was just, without incurring any costs. On these grounds I am of opinion that the rule must be discharged.

BURNS, J.—I do not think we can make this rule absolute to add the costs and expenses—namely, £46 12s.—to the verdict. The two cases relied on by the plaintiff's counsel do not establish that it is the law that the present defendant is liable over to the plaintiff for the costs and expenses of the suit brought against him. The case of *Smith v. Compton* (3 B. & Ad. 407) was an action upon covenant for title. An action had been brought against the covenantee, and he paid the sum of money to compromise the matter, besides costs. The main question in the case was, whether having paid the money to compromise the matter without notice to the covenantor, he could recover that sum and the costs upon the covenant. It was decided that he could do so. The case

of *Stratton v. Mathews* (3 Ex. 49) was whether the acceptor of a bill, which had been accepted by the plaintiff for the accommodation of the defendant, and had been paid by the plaintiff, together with a sum for costs, could arrest the defendant for the costs; and it was held that he could.

In the first case the defendant was liable on his covenant to the plaintiff; and the only question was about the notice of the suit. In the second case it was the application of a legal principle, that one who is surety for another shall be indemnified, which governed the decision. The cases upon the latter point are collected in *Chitty on Bills*, 9th Ed. 320. The case of bail for a person serves to illustrate it, as in *Sparkes v. Martindale* (8 East 593).

The present case is not one of contrast between the plaintiff and defendant, that the defendant should indemnify the plaintiff in respect of the reasonable repairs to be done to the premises, and therefore does not come within the principle of either of the cases cited. Netting sustained his action against the plaintiff on the ground that he was the person who gave the order for the repairs, and although he might have looked to the defendant as the person bound to pay him, because he, the defendant, was the landlord of the premises, and might have sustained his action on the evidence given in the present action, yet he was not bound to look beyond the person who gave him the order for the work. Of course he was right in that view of the subject; but this plaintiff did not defend the action, either because he was placed in the position of acting upon the strength of the defendant being bound to him expressly or impliedly, or because the plaintiff was placed in the position of being surety for the defendant, and as such that the defendant ought to indemnify him, but he defended upon the ground that he was not liable, never having himself, as he contended, given any orders for the work. It may often be the case that a person doing work for another may have more than one person legally responsible to pay him, and he may select which he will sue; but unless there be some contract existing, or to be implied from the position in which the parties stand to each other, to indemnify for what is

done, no right to recover expenses which one side had to pay can exist. The evidence in this case proved to the satisfaction of the jury that the defendant should pay for the repairs, as well as the evidence in the other case satisfied that jury that the plaintiff was also bound, because he made himself responsible by giving orders; but no implied contract that the defendant should indemnify can be made from that circumstance, and the facts do not establish any legal duty cast upon the defendant.

For these reasons I think the rule should be discharged.

The CHIEF JUSTICE took no part in this judgment.

Rule discharged.

IN RE McDONALD AND PRESENT.

Arbitration—Award made by two arbitrators in the absence of the third—Necessity for notice to the third.

The reference was to two arbitrators, with power to appoint a third, the award to be made by the three or any two of them. The subject referred was what sum of money *should be paid by P. to M.* as the difference in value of certain land to be given up by each to the other, and the costs were to be in the discretion of the arbitrators. The arbitrators met, and two of them, considering that the land to be given up by P. was worth £50 more than that of M., determined to award that the difference *should be paid by M. to P.*, and that the costs should be borne equally by both parties. When the two went to have the award drawn up they were told that it was out of their power under the submission to award any sum to be paid by M. to P., and they then, at a subsequent meeting, altered their decision, and awarded one shilling to M., but directed that he should pay all costs, which they fixed at £76 10s. The third arbitrator was not present at the last meeting, and it appeared that he had been notified of the intention to meet again, but no proper notice had been given to him of the time and place of meeting, nor of the intended alteration in the award.

Held, that the award must be set aside; that by sending notice to the third arbitrator of their intention to meet again, the two making the award had shewn that they did not consider his declaration of dissent as final, and therefore he should have had proper notice to enable him to confer with them on the propriety of the proposed change in the award.

M. C. Cameron obtained a rule *nisi* to set aside the award in this case, on the ground of misconduct in the arbitrators, in disregarding the evidence given of the value of the land which they were chosen to estimate; in making their award in the absence of the third arbitrator, Mr. Harland; and in awarding costs against Mr. McDonald, one of the parties, when it had been agreed between the said arbitrators that such costs should not be awarded against him; and because the arbitra-

tors had awarded an unfair value for the land of Mr. Presant, the other party to the submission.

Connor, Q. C., shewed cause, and cited *Little v. Newton*, 2 M. & Gr. 351; *Wade v. Dowling*, 4 E. & B. 50; *Wright v. Graham*, 3 Ex. 131; *In re Hall and Hinds*, 2 M. & Gr. 847; *Phillips v. Evans*, 12 M. & W. 309.

M. C. Cameron, contra, cited *In re Pering and Keymer*, 3 A. & E. 245.

The facts of the case fully appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The reference was to two arbitrators, Messrs. Harland and George, with power to them to appoint a third; and the three or any two of them, were to make their award by the 1st of January, 1857, or by such time as should be appointed by any two of the arbitrators.

The subject referred was, what sum of money should be paid by Mr. Presant to Mr. McDonald, and by what instalments, as the difference in value between certain town lots in Guelph, which Mr. McDonald was to convey to Mr. Presant, and the value of a much smaller portion of Mr. Presant's land in Guelph, which Mr. McDonald desired to be allowed to occupy for a road leading from his own property through that of Mr. Presant.

The costs of the submission, reference and award, were to be in the discretion of the arbitrators.

Thomas Saunders, Esquire, was appointed the third arbitrator. The time was enlarged to the 2nd of February, 1857, and on the 19th of January Mr. Saunders and Mr. George made an award.

The submission was contained in a sealed agreement, executed by both parties, drawn up with much more than ordinary care, in which the objects of the reference were set forth at great length, very particularly and precisely. Every one who reads this submission must admit that both parties, if they took the trouble to read it, must have executed it under the conviction that the exchange was by no means an even one, and that a considerable amount would be found to be coming to Mr. McDonald, as the difference

in his favour between the value of the land he was to give up to Presant, and the land which Presant was to relinquish for the purpose of the intended road ; for the agreement provides that the arbitrators are to fix the amount of the difference in value which shall be paid to said J. A. McDonald, and shall direct in what manner and proportions the amount of the said difference shall be paid, secured and satisfied to him, his executors and administrators. And in the agreement it is also expressly provided that the difference, whatever it may be, which Mr. McDonald is to receive, shall be secured to him on the same terms and conditions as those which the said McDonald "shall prescribe for his intended public sale of lots composed of the subdivision of park lot No. 3 in division F. aforesaid, in the township of Guelph."

It is sworn by Mr. Presant, in an affidavit now filed by him, that before this submission he had asked from Mr. McDonald £100, as a difference in value, to which he considered he would be entitled on an estimate of the relative value of the property to be given up by them ; and that when they afterwards agreed to refer the matter to arbitration, he did not know that the agreement which he executed was so drawn up as to provide only for naming the sum that should be paid to Mr. McDonald, assuming thereby that the difference would be certainly found in his favour.

A statement of that kind is not to be readily admitted by a court, in acting upon an agreement drawn up by a professional man in terms so plain as this is, and signed by Mr. Presant in a hand which does not shew him to be a man illiterate and unused to business. But however the fact may be in that respect, the three arbitrators met under that submission, and having received evidence and inspected the different parcels of land, which they must have been well able to value, two of them, it appears—that is Mr. George and Mr. Saunders—came to the conclusion that the land to be given up by Presant for the road was worth £260, and that the lots of land which McDonald was to convey to him were worth but £210, and they determined to award that the difference, £50, should be paid by Mr. McDonald to

Presant, and that the costs of the reference and award should be borne equally by the parties.

The third arbitrator, Mr. Harland, it appears, did not agree to that award, and said that he would not.

The other two arbitrators, when they made known their decision, and desired to have an award drawn up, were told that it was inconsistent with the terms of the submission, and that they could not award any sum to be paid by McDonald to Presant. They reconsidered their decision in consequence, and remodelled their award, declaring that they found the land which was to be given up by Mr. McDonald exceeded in value the right of way to be conceded by Presant, by the sum of one shilling, which sum they awarded that Presant should pay to Mr. McDonald. And they directed, further, that Mr. McDonald should pay all the costs of the reference and award, which costs they fixed at £76 10s. It is candidly explained by the two arbitrators, that when they found they could not award £50 in favor of Presant, as they had intended, they changed their direction as to costs, and threw them altogether upon the other party.

The affidavits as to the reasonableness of the valuation are extremely inconsistent with each other. Before we read those on the part of Presant, we could not but apprehend that the two arbitrators who made the award must have proceeded upon some erroneous principle in making up the estimate. Their known characters and intelligence must give us every assurance that they undoubtedly desired to do what was just, and believed they had done so; and the affidavits filed in support of their valuation certainly do contain strong statements in favour of the opinion which they have given upon the question of comparative value. This being so, we can only look upon it as a case of opposing testimony and opinions upon a point on which we have no right to interfere, unless the amount were much larger than it is, and unless we could clearly see that the amount was so outrageously excessive as to do violence to common sense.

There remains yet to be disposed of the complaint against this award, that it was made by two only of the three arbitrators in the absence of the third, and without giving him

notice of their meeting at which the award, as ultimately settled by the two, was agreed upon.

No doubt, whenever an award is to be made, as in this case, by three arbitrators, or any two of them, all must be called together, and must have an opportunity of conferring, and all must hear the evidence, though the award may be made by the majority when they are unable to agree.

That is the course always intended to be followed, for though the submission states that the award may be made by three arbitrators, or any two of them, that does not mean that two may proceed without notice to the third.

But, on the other hand, when one of the arbitrators, on being properly notified, refuses to attend, or pays no attention to the summons, or when, having attended on one or more occasions, he declares that he will attend no more, either because he cannot concur in the views taken by the others, or for any other cause, then the others may proceed without him, and, as we take the law to be, need not give him notice of their meetings, after he has unequivocally declared that he will take no further part.

In support of the objection to this award which we are now considering, the case of *Pering and Keymer* (3 A. & E. 245) has been cited. But it is not in point upon the present occasion, though it has a material bearing upon this objection, for the decision turned upon a peculiarity in that case which is not to be found in the present. There one of three arbitrators, finding himself unable to agree with the others, told them he would have nothing more to do with the matter; but having received in some way an intimation of what they intended to award, he sent in to them some written objections; but the other two, without considering these objections, went on and made their award. The court said that the two arbitrators had not treated the declaration of the other arbitrator, that he would have nothing to do with the matter, as final, and that having got into communication with him again upon the matter, they were bound to hear what he had to say in support of his objections.

Now, in the case before us, Mr. Harland, who is since dead, has made an affidavit that he heard all the evidence,

and attended all the meetings but the last. He then, after stating the principle upon which the other arbitrators seemed determined to proceed in making their estimate, and his objection to it, adds that at the last meeting of the three arbitrators upon the matter referred, it was decided that all costs should be borne in equal proportions by the said parties, and that he did not attend upon a subsequent occasion, when the decision in that and other respects was changed, nor did he concur in the same. Whether he had or had not received notice to attend at the meeting at which the arbitrators altered their decision, to which he declared he would not assent, he does not state.

One of the other arbitrators, Mr. George, swears that while he and Mr. Saunders were under the impression that they could award a sum to be paid to Mr. Presant, they stated in presence of Mr. Harland their conviction that the right of way was worth £260, and the lots to be conveyed to Presant by McDonald worth £210, and therefore that £50 should be awarded in favour of Presant, and each party should pay half of the costs, and that, if they had had the power to do so, the award would have been to that effect.

In this opinion, he says, Harland did not concur, and gave them to understand he would not join in any award adverse to the said McDonald; and after finding what their determination was, from what passed, "I considered," Mr. George swears, "that he did not intend further to interfere with the matter."

"Upon consulting counsel with reference to making the award," Mr. George adds, "we learned that we had no power to award any sum in favour of the said Presant, and then, *after taking steps to notify* the said Harland of *our intention to meet*, the said Thomas Saunders and myself, at a meeting subsequently held, concurred in and published the award as it now stands." It is to be remarked of this affidavit that Mr. George does not say that steps were taken to notify Mr. Harland of any particular day on which they intended to meet, nor that they were to meet for the purpose of making an award very materially differing from that which he had heard them say they had resolved upon

at the meeting of the three, and which he had entirely dissented from.

Mr. Saunders, the other arbitrator concurring in the award has made an affidavit in precisely the same terms.

There is also an affidavit of Mr. Kingsmill, in which he swears that he sent by post a written notice to Mr. Harland, that the time for making the award had been enlarged to the 2nd of February, 1857; and he adds, "*I am also aware that notice was sent to the said John Harland of the intention to meet for the purposes of the reference, previous to the meeting of the said arbitrators, Frederick George and Thomas Saunders, at which the award as it now stands was finally decided upon and published.*"

Mr. Kingsmill, who served, or rather posted the notices of of enlargement, only swears that he is *aware* that notice was sent to Harland of the intention to meet for the purpose of the reference. He gave us no copy of that notice, as he did of the other, because he did not send it, or at least he does not say he did, nor does he tell us, nor are we in any other way informed, whether it was, what it certainly ought to have been, a notice of a meeting for a particular day, and for the purpose of reconsidering and altering the terms of their intended award. Unless it was a notice of that kind it was not a sufficient notice. By sending him word that they *intended to meet again* for the purposes of the reference, they shewed, as the court said the two arbitrators shewed in the case of *Pering v. Keymer* (3 A. & E. 245), that they did not treat his declaration that he would not agree with them as final; and they ought to have given him notice of their intention to meet at a certain day and place, and should also have made him aware that they had abandoned the intention of making that award, which he had declared he would not agree to, and should have given him an opportunity of conferring with them upon the propriety of making that party pay all the costs in whose favour they were making an award.

He might have failed in changing their minds, and he might have declined attending after he had a full knowledge of the change in their course, and of the day on which they

intended to meet and reconsider the matter, but it should be shewn that at least he did know what they proposed to do, and had an opportunity of discussing the propriety of their proposed award with them.

They were not at liberty to conclude, because he would not agree to an award that Mr. McDonald should pay £50, that he would not agree to an award that he should pay one shilling, or that he would not be able to convince them that, because by the terms of the submission they were precluded from awarding nothing to Mr. McDonald, that was no satisfactory reason for making such an award as gave him nothing in effect, and at the same time made him pay all the costs of the reference, which was necessary for the purpose of both parties, and thus take from him much more than they had awarded him. The other arbitrators might have convinced Mr. Harland that that was just, in which case he would probably have executed the award with them, and if they had failed in that, they could then with strict propriety have executed it alone; but looking at the proceeding as it did take place, we think it was contrary to the rules which courts of justice have laid down, and consistently acted upon, as being necessary for insuring both parties to a reference a full and fair opportunity of being heard, and of having the judgment of those persons to whom they have submitted the case. And it is material to be considered that Mr. Harland was the arbitrator chosen by Mr. McDonald. Mr. Harland being dead, there can be no reference back to the same arbitrators; and indeed, under the circumstances, that course could at any rate not properly be taken, because the judgment of a majority has been formed and made known, and there would be no use in referring the case back to them.

The award must be set aside, but without costs.

Rule absolute.

AUGER V. THE ONTARIO, SIMCOE AND HURON RAILROAD UNION COMPANY.

O. S. & H. R. R. Co.—Obligation to fence—Pleading—Notice to fence.

Declaration, against the Ontario, Simcoe and Huron Railway Company, alleging that the plaintiff's horses were lawfully upon certain land belonging to one M., out of which the defendants had taken a strip for their road; that the proprietor of said lands desired them to fence off the land so taken from his land, yet defendants neglected to do so, by means whereof the plaintiff's horses, then being upon said land, escaped therefrom on to the railway, and were killed by the train.

Held, on demurrer, declaration bad, as it was not averred that the horses were on the land with the consent of the owner, and defendants therefore were not liable.

Upon the trial it appeared that M.'s land, from which the plaintiff's horses got upon the track, was *altogether uninclosed*, but that they were there by M.'s consent, the plaintiff having agreed to pay her a small sum for their pasturage. *Held*, that the company were not liable.

A notice to fence, given by letter written to M.'s son, who acted for her in such matters, to the superintendent of the company—*Held*, sufficient.

Declaration—That after the passing of the 12 Vic., ch. 196, and before and at the time of the committing of the grievances by the defendants, as hereinafter mentioned, the plaintiff's horses were lawfully grazing, being, and running at large upon a certain piece or parcel of land, situate, lying and being in the county of Simcoe: that after the passing of the said act, and before the committing of the said grievances, the defendants had laid out and constructed their road, and had passed through the said piece or parcel of land aforesaid; and for the purpose of making a portion of the said railway, and for the use of the same, took of the said piece or parcel of land a certain portion or strip, extending across the said piece or parcel of land from one side thereof to the other, of the width required for the said railway: that long before the committing of the said grievances the said railway had been and was finished and completed, and in operation, and divers engines, locomotives, and cars of the defendants had been and were in and upon the said railway, running, passing and repassing continually and at all times: and the plaintiff further saith, that after the defendants had so taken the said portion or strip of land for the use of the said railway, and had laid the same open as aforesaid, and after the said railway had been and was completed and after the said engines, locomotives, and cars had been for the period aforesaid running, passing and repassing, and before the commit-

ting of the said grievances, the proprietor of the said piece or parcel of land desired the defendants the said strip or portion of land, and the said track or railway, so far as it extended across the said piece or parcel of land, to separate and keep continually separated from the remainder of the said piece or parcel of land which adjoined thereto, with good and sufficient posts, rails, hedges, ditches, mounds or other fences; yet the defendants did not, within a reasonable time after they were so requested as aforesaid, nor at any time before or afterwards, make or construct such fences as aforesaid, nor did nor would separate nor keep constantly separated the said portion or strip of land, railway or track from the residue of the said land adjoining thereto, by any means or in any manner whatsoever, but wrongfully and and injuriously neglected and refused to do so: by means whereof the horses of the plaintiff, to wit, two horses, then grazing and being upon the residue of the said piece of land, escaped and strayed from the said land into and upon the said strip or portion of land, being a portion of the said railway; and while the said horses were so strayed as aforesaid into and upon the said strip of land, certain locomotives and cars of the defendants upon the said railway, under the control of the defendants, ran against and killed the said horses, &c.

The defendant was allowed to plead and demur to the declaration. The ground of demurrer assigned was that the declaration shewed no ground of action, a person who had his cattle lawfully on another man's land not having a right to sue the company for a breach of duty towards the owner of the land.

McMichael, for the demurrer, cited *Renaud v. Great Western R. W. Co.*, 12 U. C. R. 408.

D'Arcy Boulton, contra, cited *Dolrey v. Ontario, Simcoe, &c., R. W. Co.*, 11 U. C. R. 600; *Marsh v. New York and Erie R. R. Co.*, 14 Barb. 364.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the defendants are entitled to judgment on the demurrer. The declaration rests the right to recover entirely upon the omission of the defendants to fence

in their track, but that can only give a right of action where the cattle killed belonging to the owner of the land are upon his land, which the company ought to have fenced off from the railway, or where the owner of the cattle has them on that land by privity with the owner of the land: that is, with his leave. The case of *Ricketts v. East and West India Docks, &c., R. W. Co.* (12 C. B. 160) fully explains this. What is stated in this declaration is not that the plaintiff's cattle were on the land, which it is alleged ought to have been fenced off from the railway, by the consent of the owner of the land, but merely that they were *lawfully* there, without shewing how they were there lawfully. It may be that the plaintiff means that they had a right to be at large generally, as horses may be according to the regulations of particular townships, and that means that they have a right to go wherever there is not a lawful fence to confine them; but that would not constitute a case of privity between the owner of the horses and the owner of the land.

The effect of holding the company liable for accidents (and no negligence is charged against them here) happening to cattle not belonging to the owner of the land against which they are bound to fence, nor being upon his land with his privity, would make them liable for accidents to all the cattle of the township, if they strayed from a common on which they lawfully were, which common was not fenced off from the railway, although the company would not, by anything that is to be found in the statute 12 Vic., ch. 196, be bound to fence against the common.

Judgment for defendant, on demurrer.

At the trial of this case, before *Hagarty, J.*, the facts appeared as follow. The proprietor of lot 26 in Sunnisdale had given permission to the plaintiff to pasture his horses during the season of 1857 on her lot, through which the railway passed: other persons had a similar permission. The plaintiff agreed to give her the price of the making of a dress for the privilege. The land adjoining the railway was all open, and no fences separated it from the track. The horses were killed on the 25th of May last, in the day time,

having come from the land where they were grazing to the track. The train was stopped in order to get the horses off the track, and the steam whistle was sounded; but the horses ran along the track for a quarter of a mile, and were then run over and killed.

The defendants had been requested by the son of the proprietor of the lot, as he stated, in November, 1856, to fence off the railway. The request was made to Mr. Grant, the superintendent of the railway, at his office, by addressing a letter to him at the office of the defendants in Toronto, and sending it through the post office.

The defendants' counsel objected at the trial to the action, on the following grounds:—

1st. That the plaintiff, not being the owner of the land, could not maintain this action.

2ndly. That the horses, pasturing in an open piece of ground could not be said to be lawfully there, as averred in the declaration.

3rdly. That where the land is open on all sides, the case is not one to which the statute applies.

4thly. That no sufficient demand was shewn by the proprietor to fence the land.

The learned judge left the case to the jury, on the statute, asking them to say whether the accident was the result of the defendants' breach of duty, and they found a verdict for the plaintiff, and £75 damages. The legal questions arising on the objections were withdrawn from the jury, and reserved as ground of nonsuit.

McMichael obtained a rule to shew cause why a nonsuit should not be entered according to the leave reserved, or for a new trial: to which *D'Arcy Boulton* shewed cause.

The rule and demurrer were argued at the same time.

ROBINSON, C. J., delivered the judgment of the court.

It is not alleged that the defendants wilfully or negligently drove against the horses, but the action is grounded solely on an imputed neglect in not fencing in the track; and the question is, whether the plaintiff, under the circumstances of this case, can hold the defendants liable on that account.

The defendants have pleaded not guilty, by statute, as well as demurred to the declaration, and we have to consider the legal effect of the evidence taken in connexion with the pleadings.

The plaintiff's horses seem to have been killed not quite accidentally, but by the negligence of the defendants. The evidence shews that it would have been quite easy to have avoided running over them, as they were seen plainly and in time; but the declaration does not claim damages on account of any such negligence or improper conduct of the defendants in running their train, but entirely on account of the omission of the company to fence; and when we look at the evidence we see what is for the first time brought out in the case, and did not appear in the pleadings, that the horses escaped upon the track from open uninclosed land, adjoining the property of one O'Connell, who had allowed the plaintiff, for a trifling reward, to let them run there for the season.

But that land of O'Connell, it was proved, was not merely open to the railway, but was open on all sides, so that cattle could come into it and go from it at pleasure from any of the adjoining lands. The learned judge desired the jury to find whether the plaintiff's horses escaped out of O'Connell's land upon the railway track, or whether they did not come upon the track from the land of some other proprietor, as it was a mile or so distant from O'Connell's property that they were killed.

The jury did not declare how they found that fact to be, but merely found generally for the plaintiff.

If the horses were found by the jury to have been on O'Connell's property with her license, and to have escaped from thence on the railway and been killed, then the plaintiff, I think (if there had been no demurrer in this case), must have prevailed in the action: that is, if the jury were also satisfied that the defendants were notified to fence by the owner of the land on which the cattle were pasturing with license, and had neglected to fence: both which were proved, we think, in this instance, for the son of Mrs. O'Connell, who owned the lot, acted in such matters for his mother, and a

notice by him would be sufficient. We do not consider that it can be denied that the defendants had sufficient notice, under the statute, to oblige them to separate their track by a good fence from O'Connell's property ; and the consequence of that would be, that if for want of their complying with the notice the horses of the owner of the land had got upon the track, and been killed or injured, the company would be liable, and so also would they be liable for the horses of any person being injured by their locomotives, in consequence of the want of a fence, who was in privity with the owner of the land, that is, occupying it by his license. But this land of Connell's was open to the whole world ; it did not merely lie unclosed where it was contiguous to the railway, but was altogether open on each side, so that the cattle of any and every person might resort there if they pleased.

Under such circumstances, although there was some evidence of what probably would never have been heard of if this loss had not occurred—namely, that Mrs. O'Connell was to have a new dress from the plaintiff for letting the horses run from snow to snow, in fields that were in fact lying open to every body's horses—yet it cannot be said that the plaintiff, because he chose to put his cattle into a field thus lying open, would have any remedy for their loss against the owner of the land, nor can he, in our opinion, be recognized as having any claim against the company.

The fact that the plaintiff agreed to pay a nominal sum for a privilege that others enjoyed for nothing, has not the effect, we think, of making him such an occupier of the land within the meaning of the act as the company are bound to fence against.

We think a nonsuit should be entered.

Rule absolute (a).

(a) See Redfield on Railways, an American work very lately published, pages 363, 374.

HANSCOME V. COTTON.

*Action by indorsee against indorser—New trial granted as to indorser only—
Effect of maker's name being signed without authority—Estoppel.*

In an action by indorsee against maker and indorser, a verdict was found in favour of the maker, on the ground that his name had been signed to the note without authority, and against the indorser; and a new trial was granted as to the indorser only. *Held*, that the jury, at such trial, were rightly directed that the fact of the maker's name having been used without authority, was a fact material for them to consider, in connexion with other evidence offered to shew that the plaintiff took the note with knowledge of the circumstances.

Quære, as to how far an indorser is estopped from denying the maker's signature.

Action on a promissory note, for £375, by the indorsee against the maker and indorser.

The pleadings in this case are stated in 15 U. C. R. 42, where it will be seen that the jury having found in favour of the maker, on the ground that his name had been signed to the note by one Anderson, as his agent, without authority, and against the indorser, a new trial was granted as to the indorser only, leaving the verdict for the maker to stand.

At the last trial, at Toronto, before *Drapac*, C. J., against the indorser only, the jury found for the defendant

J. Duggan obtained a rule *nisi* for a new trial, on the law and evidence, and for misdirection, in directing the jury that the note having in fact no maker, James Cotton's name having been put to it as maker by Anderson without his authority, and the plaintiff having in consequence failed in his action as against him, was a fact in this case material for them to consider, for it so appeared that the defendant, Robert Cotton, was charged as indorser of a note which had been found to be in fact no note; and also in submitting to the jury whether Robert Cotton got any consideration for indorsing, and whether under all the circumstances there could be a verdict for the plaintiff.

ROBINSON, C. J.—The 4th, 5th and 6th pleas of defendant Robert Cotton were those on which his defence rested, and I think they were made out in evidence. The case has been several times tried, once before me, and former juries have found in the plaintiff's favour, but against evidence, as it

appeared to me on the occasion on which I tried the case ; and I think I am correct in saying that the same view of the case was taken by the judges who presided upon the other trials.

Upon reading the evidence in this case on the last trial, I think it would have been strange if the jury had come to any other conclusion than that Anderson had knowingly made this note in James Cotton's name without his express authority, and equally without any implied authority, by his position or otherwise. He admitted that this was the first occasion of his having made that use of James Cotton's name; the indorsement, however, by Robert Cotton was in his own handwriting, being intentionally put by him upon this note while it had yet no signature to it, with the intent that his brother, James Cotton, might sign it as maker, and fill it up for such sum as he might desire, in order to raise money for carrying on their business. Such confidence is not unfrequently placed in others by persons who indorse in blank, and it is well known to be no defence for them to urge that the note had no maker's name to it when they signed it; but then, in such cases, the note is afterwards signed by that person as maker for whose accommodation the other had indorsed in blank. Here it was proved, and the jury have found, that the fact was otherwise, for that Anderson, taking improper advantage of the fact of this blank coming into his possession, put James Cotton's name to it as maker, not in the fair course of transacting Cotton's business (if that alone would have been sufficient), but to serve a purpose of Anderson's own.

That was a fact in the case, as the verdict in James Cotton's favour had established ; and the learned Chief Justice of the Common Pleas was correct in saying that it was a material fact, because it laid a foundation for and gave force to the other evidence, brought for the purpose of proving that the plaintiff, who was suing on this note as indorsee, took this note with a knowledge of the circumstances, which is alleged in one of the pleas. Unless he did so, or took the note when over-due, or without giving consideration for it, the defence would not avail, because undoubtedly, as Mr. *Duggan* has contended, if the maker's

name to the note had been forged, that would not prevent the indorser from being liable to an indorsee who took the note innocently and for value. I am persuaded that there could have been no misdirection to the jury on that point; and the evidence was so convincing, I think, to establish the truth of the special pleas, that we should be assisting in carrying on a fraud, rather than advancing the ends of justice, if we were to set aside the verdict which has been given for the defendant Robert Cotton.

BURNS, J.—The case now going to the jury upon the note as against the indorser, with a judgment in favour of the other defendant, who was said to be the maker, on the ground that he never did make the note, does, as remarked by the learned Chief Justice of the Common Pleas, present a novel feature, and he simply called the attention of the jury to the fact. There is no denying the fact, but the question is this, whether, notwithstanding that fact, the learned Chief Justice was bound to tell the jury that the defendant Robert Cotton was estopped from shewing that the bill which he indorsed had in truth no maker's name to it. On the pleadings he was not bound to do so. Mr. Taylor, in his work on Evidence, page 681, says, "It was long the prevailing opinion in Westminster Hall that the indorsement of a bill of exchange also operated as an estoppel on the indorser to deny any of the preceding signatures. This last doctrine, however, has lately been questioned by the Court of Exchequer; and though an indorsee who sues an indorser may doubtless be saved the necessity of proving the prior indorsements, by alleging in the declaration that the defendant indorsed a bill *purporting* to be drawn by the drawer and indorsed by him to the defendant; yet if he chooses to aver positively that the bill was drawn by a certain person, it seems that the defendant is still competent in law to deny that fact, though his indorsement is cogent and almost irresistible evidence of its truth." *Armani v. Castrique* (13 M. & W. 443). I refer also to *Farr v. Ward* (2 M. & W. 844), where Mr. Baron Parke says that he does not say it is so, that a holder of a bill which had been accepted in blank, and of which the drawer's name had been

forged, might sue and the acceptor be estopped. See also Bull., N. P. 270, where it is said that though an acceptance is *prima facie* an admission of the handwriting of the drawer, in action against the acceptor, it is *not conclusive* so as to prevent him from proving the contrary.

There was no misdirection of the learned Chief Justice; and the question for the jury was, whether the plaintiff knew the facts—namely, that the defendant Robert Cotton had indorsed notes in blank, that his brother might use them as he pleased by himself becoming the maker, and that the brother's clerk made use of one of such blank indorsements by drawing a note in the name of James Cotton, which he was not authorized to do in any way—and whether the plaintiff was an innocent holder of the note. There is no fault, I think, to be found with the finding of the jury.

McLEAN, J., concurred.

Rule refused.

SHAW ET AL. V. CRAWFORD.

Defendants endorsed to the plaintiffs a note, made by one P., for £125, due on the 13th of May, 1857. On the 13th of April P. executed to the plaintiffs a mortgage, payable on the 1st of November, 1857, for a sum including the amount of the note; but it was expressly agreed in the mortgage that it should "operate and take effect as a collateral security only." *Held*, that the plaintiffs might sue upon the note when it fell due, although the mortgage was not yet payable.

This was an action to recover the sum of £125, being the amount of a promissory note, dated the 10th of February, 1857, made by one William Polley, payable to the order of defendant, three months after date, and endorsed by defendant to the plaintiffs.

The defendant pleaded as follows:—1. That after the making of the note, and before the commencement of this suit, and while the plaintiffs were the holders thereof, it was agreed between the plaintiffs and William Polley, without the defendant's consent, that in consideration of the said William Polley's executing and delivering a certain mortgage to the plaintiffs on certain real property of the said William Polley, and entering into a certain covenant in the said mortgage contained, to pay to the plaintiffs a certain

sum of money in said mortgage mentioned, which said sum included the amount of said note, with other claims of the plaintiffs against said William Polley—the said plaintiffs should forbear and give time for the payment of the said note to the said William Polley for the period of a year; and in pursuance of said agreement said William Polley did afterwards, and before the commencement of this suit, execute and deliver to the plaintiffs a mortgage on said real property, and entered into a covenant to pay said note, with other sums due from said Polley to the plaintiffs; and the plaintiffs accepted and received said mortgage without the consent of defendant; and the plaintiffs did forbear and give time to Polley to pay said note.

2. That after said note became due, and while the plaintiffs were the holders thereof, Polley made and executed a mortgage, whereby he conveyed to the plaintiffs certain lands, and entered into a covenant in said mortgage to pay the plaintiffs a certain sum of money, in which sum was included the amount of said note, which mortgage Polley delivered to the plaintiffs, and the plaintiffs accepted the same in satisfaction and discharge of the said sum of money in said note specified, and all damages sustained by reason thereof.

The plaintiffs replied, that the defendant of his own wrong, and without the cause assigned, broke his said promise in the declaration contained, as in the said declaration alleged.

At the trial, at Toronto, before *Draper*, C. J., a verdict was found for the plaintiffs for £129 1s. 7d., subject to the opinion of the court thereupon.

The defendant, at the trial, read the evidence of William Polley, the maker of the note, taken under a commission. From this evidence it appeared that on the 13th of April, 1857, the said William Polley, by indenture of bargain and sale by way of mortgage, granted certain lands therein mentioned to the plaintiffs by way of security for the sum of £1600, which sum embraced the amount of the promissory note declared upon. The proviso for redemption was for payment of the said sum of £1,600 on or before the 1st of November, 1857, and the mortgage contained a covenant for the pay-

ment by the said William Polley of the said sum, according to the terms of the said proviso. Upon the said mortgage being produced by the plaintiff, under notice from the defendant in that behalf, this so appeared; but the following clause also appeared to be included in the said mortgage—that is to say, “And it is hereby declared and agreed, by and between the parties hereto, that these presents are to operate and take effect as a collateral security only.”

The question for the opinion of the court was, whether the defendant's special pleas, or either of them, were or was proved in law by the evidence adduced (of which the foregoing is the purport); and if the court should be of opinion that the said pleas, or either of them, were or was supported in law by said evidence, then it was agreed that a verdict should be entered for said defendant on such plea or pleas, otherwise for the plaintiffs.

Adam Crooks, for the plaintiffs, cited *Wyke v. Rogers*, 1 DeGex. McN. & G. 408; *Boulton v. Stubbs*, 18 Ves. 20; *Price v. Barker et al.*, 1 Jur. N. S. 775; *Kearsley v. Cole*, 16 M. & W. 128, 136; Jur. 1857, 1054.

McMichael contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the effect of the stipulation in the mortgage given by Polley, the maker of the note, to Shaw and others, the indorsees, that it was agreed between them that the mortgage should operate as a collateral security only, is to save to the plaintiffs, the indorsees, their remedy upon the note, so that they may enforce payment of the note against the maker, Polley, in the meantime, according to the terms of the note. Then, as a consequence, it follows of course that if these plaintiffs, by reason of their reserving their remedy on the note, can make Polley pay according to the note, they can also make this defendant, as indorser, pay in the same manner, for he is as a new maker, and must be bound to pay whenever the maker can be made to pay; and it follows, also, that this defendant, as indorser, will stand in the same situation, in regard to his recourse against Polley, as he would have stood if no such mortgage had been made. His only defence, by reason of the mortgage, could be that

it had had the effect of giving time to the maker of the note, and so had tied up his hands from proceeding against him till the day appointed for payment by the mortgage had arrived ; but if, as we assume is the effect of this mortgage, no difficulty is created by it in the way of enforcing the note according to its terms, then the defendant, as endorser, has no ground for resisting payment of the note.

The effect which this mortgage has, under the circumstances of this case, is well explained by the court, in *Kearsley v. Cole* (16 M. & W. 127), which case shews clearly, we think, that upon the case stated the defendant was not entitled to succeed on either of his pleas : not on the first, because it is not true (by reason of the reservation contained in the mortgage) that the plaintiffs “*gave time to Polley for the payment of the note ;*” and it is not true, as pleaded in the second plea, that the mortgage was given in satisfaction and discharge of the note. The intent evidently was, that the mortgagor was not to be disturbed, *under the mortgage*, till the time came that was mentioned in it, but that, as the holders of the note, the plaintiffs might be at liberty to deal with that independently of the mortgage.

Judgment for plaintiff.

HESPELER, APPELLANT, AND SHAW, RESPONDENT.

Conviction for working on Sunday—8 Vic., ch. 45—Statement of defendant's calling—Negating exceptions—Appeal to Sessions—Certiorari.

Defendant was convicted under 8 Vic., ch. 45, “for that he, Jacob Hespeler, of the village of Preston, Esquire, did, on Sunday, the 26th of July last past, at the township of Waterloo, work at his ordinary calling, inasmuch as he and his men did make and haul in hay on the said day.”

He appealed to the Quarter Sessions, where the question was tried before a jury, and the conviction affirmed. The proceedings having been removed by *certiorari* to this court.

Held—1. That the statute 13 & 14 Vic., ch. 45, extended to this case, and authorized the trial by jury, though in the 8 Vic., ch. 45, there is a provision for appeal to the Sessions, but not for such trial.

2. That a *certiorari* would lie, not to examine the finding of the jury on the facts, but to determine whether the justices had exceeded their jurisdiction.

3. That the conviction must be quashed, as not shewing any offence within the statute, for defendant was not alleged to be of nor to have worked at any particular calling.

Seemle, that it was also bad, for not negating the exception in the statute, by stating that the work done was not of necessity.

The defendant having been convicted under 8 Vic., ch. 45, for working at his ordinary calling on Sunday, appealed to

the quarter sessions, where the case was tried by a jury, and the conviction affirmed.

The proceedings having been brought up by *certiorari*,

Irving, for the appellant, cited Paley on Convictions, 4th Ed. 192, 352; 29 Car. II., ch. 7; 8 Vic., ch. 45; *Regina v. Barton*, 13 Q. B. 389; *Rex v. Jukes*, 8 T. R. 536; *Sandiman v. Breach*, 7 B. & C. 96; *Rex v. Younger*, 5 T.R. 449.

Eccles, Q. C., and *D. B. Read*, contra, cited *Rex v. The Inhabitants of Whitnash*, 7 B. & C. 596; 2 Wm. IV., ch. 4, sec. 3; *Victoria Plank Road Company v. Simmons*, 15 U. C. R. 303; *Burns' Justice* I. 555.

The facts of the case are sufficiently stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

This conviction has taken place under our statute 8 Vic., ch. 45, which admits of an appeal to the quarter sessions, but contains no provision for trying the facts before the quarter sessions, upon the appeal, by a jury; but it does provide that the party appealing shall enter into a recognizance to abide the judgment of the court appealed from.

The statute 13 & 14 Vic., ch. 54, extends, we think, to convictions under this act, as well as to other convictions, although in this act itself, (8 Vic., ch. 45) there is a provision for appeal to the quarter sessions; and this latter act 13 & 14 Vic., ch. 54, provides for the trial by jury, at the request of either the appellant or respondent, of the matter of fact involved in such appeal. When we say, "to try the matter of fact involved in the appeal," we do not mean to say that these words are contained in the statute, but that we assume that that alone can be what the act intends shall be submitted to the jury.

The first question that arises is, whether, under the circumstances of this case, a writ of *certiorari* lies. Neither of these statutes, nor any other statute that I am aware of, takes away that remedy in case of summary conviction under this statute; but it could not properly be the object of such a proceeding to reverse the finding of the jury upon the question of fact. It could only be used as a remedy when there had been a plain excess of jurisdiction, and

then this remedy would be accessible even if a statute had declared that a *certiorari* should not issue, because that prohibition would not be held to apply when the justices or sessions had entertained a matter not within their jurisdiction.

Now here the statute 8 Vic., ch. 45, on which this conviction took place, makes it unlawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, to do or exercise any worldly labour, business, or work of their respective ordinary callings upon a Sunday, excepting the conveying travellers, or her Majesty's mail, selling drugs and medicines, and such other works of necessity, and also works of charity.

The defendant has been convicted under this statute "for that he, Jacob Hespeler, of the village of Preston, Esquire, did, on Sunday, the twenty-sixth day of July last past, at the township of Waterloo, work at his ordinary calling, inasmuch as he and his men did rake and haul in hay on the said day ;" and they adjudged him for his said offence to pay immediately the sum of ten pounds, and also the sum of twelve shillings and three pence costs, and in default of payment to be imprisoned in the common gaol three calendar months, unless the said sums should be sooner paid, one moiety of the fine to be paid to the party charging the offence, and the other half to the treasurer of the county, to be by him applied according to the statute.

This conviction appears to have been made before five justices. The defendant appealed from it to the court of quarrer sessions, as allowed by the statute, and as allowed also by the subsequent statute 13 & 14 Vic., ch. 54; and the prosecutor having requested that a jury might be summoned, as provided for by the latter of the two acts, this case was tried by a jury, who found the defendant guilty of the offence that had been charged upon him, and the court adjudged him to be punished according to the conviction. Now, it would be fruitless for the defendant to attempt to remove the conviction, after it had been thus affirmed, into this court with the view of questioning the sufficiency of the evidence to establish the truth of the charge stated in the conviction. But the defendant is not deprived, in con-

sequence of the appeal or otherwise, of his right to remove the conviction into this court by *certiorari*, in order to obtain redress, if it should appear that the act of which he is stated to have been convicted was not an offence within the statute. If, for instance, the justices had convicted a tinsmith, or a shoemaker, of working at his ordinary calling on the Lord's day, and the conviction had been affirmed on appeal after a trial by a jury, we should not have allowed a *certiorari* in order to have it determined here whether the jury had before them sufficient evidence of the offence. But if, on the other hand, a driver of a stage-coach had been convicted of working at his calling, by conveying her Majesty's mail, which the statute expressly allows to be done on a Sunday; or if a clergyman had been convicted for preaching on a Sunday, or the sexton for ringing the bell, or a doctor for visiting a patient, which would all be works within their ordinary calling; such a conviction, though confirmed upon appeal, might be removed into a superior court by *certiorari*, in order to obtain the opinion of that court whether any such case as we have mentioned was within the statute. The distinction is a plain one, though it is not always so clearly pointed out as we might expect it to be (*a*).

What we have to determine in this case is, whether the conviction on the face of it shews an offence committed against the statute. The defendant is only described as an esquire, which is not in itself a calling. Many proprietors and tenants of farms are esquires, but it cannot be said truly that all esquires are tenants or proprietors of farms, or that it is the ordinary calling of esquires to rake or haul hay, either in person or by labourers employed by them.

It is to be remarked that this conviction does neither state any calling to which the defendant belonged, nor does it in direct and unequivocal terms charge him with working at any particular calling on the Lord's day, but states that he worked at his ordinary calling, inasmuch as he raked and hauled hay. The persons who were employed by him in raking, or the teamsters who hauled the hay for him,

(a) See *Rex v. Morley*, 2 Burr. 1041.

would come within the act if they were persons who followed ordinarily the occupation of labourers or teamsters. I refer to the case of *Sandiman v. Breach* (7 B. & C. 96), to the case in our court of *The Queen v. Tinning* (1 U. C. R. 636), and to the case cited in the argument of *Rex v. Inhabitants of Whitnash* (7 B. & C. 597), upon the point that the general words, "or other person whatsoever," cannot be taken to include all persons doing anything whatsoever on a Sunday, but must be taken to apply to persons following some particular calling of the same description as those mentioned, though I confess it does seem to me difficult to lay down any clear limit to the extent of those words; but it is, in our opinion, perfectly plain that this conviction does not state any offence within the statute. It does not state that it was his own hay that the defendant was raking and hauling: it does not state that he was working as a labourer for others: it does not call him a farmer, nor state such facts as shew that he was a farmer following his ordinary calling in getting in his own crops.

If a farmer so acting would come within the statute as following his ordinary calling of a farmer, yet the conviction does not state such a case in terms, nor state facts from which we can infer it; but it is indispensable that some offence should be charged in the terms of the statute. We think, therefore, that the rule for quashing the conviction must be made absolute.

The late case in this court of *The Victoria Plank Road Company v. Simmons* (15 U. C. R. 303), cited by Mr. *Eccles*, suggested a doubt whether after an appeal, and the conviction, being confirmed, the case could be removed into this court by *certiorari*. The point was not determined there, but only the doubt thrown out. The case of *Rex v. Morley* (2 Burr. 1041) shews, however, that whatever might be the case where the *certiorari* is applied for only on the ground of some defect in form, or some irregularity in the proceedings, the circumstances of the appeal and subsequent trial by jury, and judgment given by the quarter sessions, do not interpose a difficulty where the ground is that the conviction does not state an offence over which the

justices had jurisdiction. In that case the proceedings were precisely such as have taken place here, and the court were unanimous that a *certiorari* should go. The court said, "A *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds."

It is not necessary to consider the other exception taken in this case, that the conviction does not contain a legal statement of an offence under the statute, because it does not negative the exception contained in the first clause, by stating that the work done was not one of necessity, which it well might be, and we know, in the case of this description of work, the getting in hay, it often is. At present we think there is a defect in this respect, though our statute places the exception as to the works of necessity on narrower ground than the English act does.

Conviction quashed.

POTTER V. CAMPBELL ET AL.

A person not being a licensed surveyor is a competent witness on a question of boundary.

TRESSPASS, for breaking and entering plaintiff's close, and cutting down and taking away trees, tried at Cobourg, before *Richards, J.* Verdict for plaintiff.

Galt moved for a new trial for the reception of improper evidence.

ROBINSON, C. J., delivered the judgment of the court.

We cannot properly grant a rule. The ground is that the learned judge, in this action for cutting and taking away the plaintiff's timber, suffered a witness who was not a licensed surveyor to give evidence for the plaintiff in regard to the boundary between him and the defendant. We could not hold it to be a legal principle that no man but a surveyor can be heard upon the question of fact, whether a man had cut timber over the line between him and his neighbour; but where it appears on the whole evidence to remain a doubt whether the true boundary has been passed over or not, the

jury would in any such case most probably be told, that, as the plaintiff had not taken the proper means of solving the doubt, it would not be safe to give him a verdict.

PROCTOR V. GAMBLE.

Deed of land and mortgage back—Prior lease—Covenants for title—Right to sue on—Money paid.

The defendant conveyed land to plaintiff by deed, made under the act to facilitate the conveyance of real property, containing covenants for right to convey, for quiet possession, and that he had done no act to incumber, and on the same day took back a mortgage in fee to secure the purchase money, in which it was provided that the plaintiff should retain possession until default. Before making the deed the defendant had leased land to one D., to whom the plaintiff was obliged to pay £66 to obtain possession.

Held, that this sum could not be recovered as money paid, and that the plaintiff could not sue upon the covenants in the deed while the mortgage continued in force.

The plaintiff declared that the defendant, by deed made on the 18th of April, 1856, in pursuance of the act to facilitate the conveyance of real property, conveyed to him certain land, and the defendant also thereby covenanted with the plaintiff that he had the right to convey the said land to the plaintiff, notwithstanding any act of the defendant, and that the plaintiff should have quiet possession of the said lands free from all incumbrances, and that the defendant had done no act to incumber the said lands; and the plaintiff says that the defendant broke his said covenant, in this, that the defendant at the time of making the said indenture had not the right to convey the said land to the plaintiff, notwithstanding any act of the defendant, nor did the plaintiff thereby obtain quiet possession of the said lands free from all incumbrances; and that the defendant had incumbered the said lands, in this, that before the making of the said indenture one Luther Dodge held and occupied the said land, as tenant thereof to the said defendant, under a certain agreement and lease thereof by the defendant to the said Luther Dodge, to put crops in the said land in the fall of the year 1856, and harvest the same, which said term was in force and unexpired, and the said Luther Dodge was in possession of the said land at the making of the said inden-

ture, and the defendant had not the right to convey the said land except subject to the said lease and incumbrance, and the said land was then incumbered by means of the said lease, and the plaintiff lost the use and enjoyment of the said land for six months, and was forced and compelled, in order to obtain possession of the said land, to pay to the said Luther Dodge a large sum of money, to wit, the sum of £75, in order to obtain the release of the said term, and the possession of the said land from the said Luther Dodge.

A count was added for money paid, and for money received.

Defendant pleaded, that contemporaneously with the making of the deed in the first count mentioned, and before the commencement of this suit, and before the alleged breach of the said covenants, to wit, by a certain indenture of bargain and sale made between the plaintiff of the first part, and the defendant of the other part, the plaintiff, for the consideration therein mentioned to have been paid, did grant, bargain, sell and convey the premises in the said first count mentioned to the defendant, his heirs and assigns for ever, to and unto the use of the said defendant, his heirs and assigns for ever: by means whereof the said covenant and alleged causes of action in the first count mentioned, became, and were, and are extinguished.

At the trial at Woodstock, before *Burns, J.*, the plaintiff put in and proved a deed, under the act to facilitate the conveyance of real property, of the land mentioned in the declaration, from the defendant to the plaintiff, and the defendant put in and proved a mortgage in fee of the same land by the plaintiff to the defendant to secure the purchase money. The deeds were of the same date, and the witness said they were executed contemporaneously. The plaintiff then called a person named Luther Dodge, who said he had been put in possession of the land by the defendant on the 28th of April, 1855, under a verbal lease, which expired on the 28th of April, 1857, and that the plaintiff had paid him £66 5s. to give up possession.

The learned judge directed a verdict for the plaintiff for £66 5s., subject to the opinion of the court on the pleadings

and evidence, and documents filed, as to whether the plaintiff was entitled to recover.

D. G. Miller, for the plaintiff, cited *Kennedy v. Solomon*, 14 U.C.R. 623; *Williams v. Bosanquet*, 1 Brod. & Bing. 238.

Beard, contra, cited *Thornton v. Court*, 22 L. J. (Ch.) 361; *Kingdon v. Nottle*, 1 M. & S. 355, S. C. 4 M. & S. 56; *Sayles v. Blane*, 14 Q. B. 205.

• ROBINSON, C. J., delivered the judgment of the court.

No action can lie, we think, under the circumstances, for money paid, laid out and expended, for the reasons stated in the argument, and supported by the case cited of *Sayles v. Blane* (14 Q. B. 205). The plaintiff did not make the payment at the request of the defendant, nor has he been compelled to pay money for which defendant was liable, for the defendant had no money to pay to Dodge. The plaintiff, it seems, could not get rid of him without submitting to his terms. That is a good reason why he should claim it from the plaintiff as damages that he has been put to by defendant's breach of covenant, if he is in a condition to sue upon the covenant, but he can advance a demand in no other shape.

So it all turns on the question which the case of *Huyek v. McDonald* (3 O. S. 292) is supposed to have determined, so far as the opinion of this court is concerned, the decision in *Huyek v. McDonald* being confirmed also in the late case in this court of *Rees v. Strachan* (14 U. C. R. 53).

But the plaintiff relies upon a circumstance as peculiar to this case, and distinguishing it from the two cases we have cited, namely, that by the mortgage it was provided that the plaintiff should possess the estate till he made default. That, however, does not seem to distinguish this case from *Huyek v. McDonald*, for the mortgage given back to the bargainor seems to have been on the same condition in that respect. The mortgagee there, it is said, was to enter in case of default. That condition, it appears to us, could make no difference. It is as the owner of the estate that the plaintiff has a right to sue upon the covenant, and he cannot in a court of law be held to be seized of the fee, because he has a contingent right to continue in possession after alienating the fee.

The plaintiff, so far as his legal remedy is concerned, must pay up his mortgage, we think, and obtain a reconveyance, and then he will be in a position to bring an action on the covenants, but not before.

Undoubtedly the lease had the effect of keeping him out of possession, which he would otherwise have been legally entitled to: at least of keeping him out until he had submitted to the payment to the lessee which he complained of as his damage. But whatever other remedy (if any) the plaintiff has in consequence of that injury, he is still, in our opinion, not in a condition to sue upon the covenant for title, or for quiet enjoyment, or against incumbrances.

The plaintiff had seizin but for an instant before he parted with the estate, and had no title to possession, but for an instant, under the deed which contains the covenant sued upon. So that the occupation by Dodge occasioned him no injury while he held the estate under the conveyance. He found it necessary to pay the sum of money to Dodge in order that he might have the benefit of a privilege, which he claimed under the mortgage, of remaining in possession as holder of the equity of redemption. But when he paid that money, it was not to remove an incumbrance upon what in a court of law can be treated as his estate, for he had parted with the legal title. Neither was the plaintiff disturbed in the enjoyment of the estate which he took under the defendant's deed now sued upon.

Judgment for defendant.

DOUGLASS V. MURPHY.

Covenant to Insure—Construction of—Measure of damages.

Covenant by lessee to insure the premises in the name of the lessor, the insurance money to be expended in the erection of new buildings. *Held*, a covenant running with the land, and that an action would lie on it against the assignee of the lessee.

Held, also, that the measure of damages was the value of the premises lost to the plaintiff by defendant's neglect to insure, such value not exceeding the sum in which defendant was to be insured by his covenant; and that it could make no difference that on failure of the lessee to insure the lessor was allowed by the lease to do so, and charge the premiums as rent.

The plaintiff declared that he, by indenture, leased to one William L. Smith, his ex-ecutors, administrators

and assigns, a certain messuage, tenement and premises, with the appurtenances, in the said indenture particularly mentioned and described. And the said William L. Smith did by said indenture covenant with the plaintiff that he would at all times keep the fences, &c., thereon erected in good repair; and said buildings, fences, &c., so being repaired, would at the expiration, or sooner determination of said term, peaceably and quietly leave and surrender every part thereof to the plaintiff: and also should insure and keep insured the buildings and erections upon the said premises, during the said demise, in the sum of £550, at least, in the name of the plaintiff, in some respectable British or Canadian insurance office having an office or agency in the city of Toronto. And it was by the same indenture agreed and provided, that if the said buildings and erections should be destroyed by fire, the insurance money to be received therefor should be expended in the erection of new buildings upon the same demised property: that after the making of the said indenture, and during the term thereby granted, all the estate, &c., of the said William L. Smith, of and in the said demised premises, by assignment thereof then made, legally came to and vested in the defendant, whereupon and whereby the defendant then entered into and upon all and singular the said demised premises, with the appurtenances, and became and was thereof possessed; and although the plaintiff had done all things on his part to entitle him to the performance of the said covenants on the part of the defendant, yet the defendant did not nor would, after the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, keep the fences, houses and buildings thereon erected and being in good and tenantable state of repair; and although the said term was determined, did not nor would leave the said buildings, &c., in such good repair at the determination of said term, according to said indenture, but on the contrary thereof he suffered the fences, &c., to be destroyed and ruined; and the defendant, at the determination of the said term, left the same premises so out of repair; and in such bad repair and

condition as last aforesaid, contrary to the said covenant so made by the said William L. Smith for himself and his assigns aforesaid.

And the plaintiff further saith that the defendant did not nor would, during the said term by the said indenture granted, insure or cause to be insured, and keep insured in the name of the plaintiff, at any of the British or Canadian offices for insurance against fire in Toronto, all and singular the said buildings and erections by the said indenture demised, with the appurtenances, from and against loss or damage by fire, to the amount and in the manner specified in the said indenture in that behalf; but on the contrary thereof, the said buildings and erections were and continued to be wholly uninsured from and against loss or damage by fire by the defendant, or any other person or persons whomsoever, under and by virtue of the said covenant of the said William L. Smith, by him in that behalf made for himself and his assigns with the plaintiff, as aforesaid, contrary to the said last mentioned covenant in that behalf; and the said buildings and erections were destroyed by fire—and the plaintiff claims £1,000.

The defendant demurred to so much of the said declaration as charged that the defendant did not insure the buildings and erections on the said demised premises, stating, for causes of demurrer, that a covenant to insure was not a covenant running with the land, and that the defendant as an assignee was not liable for a breach of such covenant.

M. C. Cameron, for the demurrer, cited *Platt on Leases*, II. 227.

C. S. Patterson, contra, cited *Vernon v. Smith*, 5 B. & Al. 1.

ROBINSON, C. J., delivered the judgment of the court.

The lessee, according to the covenant as it is set out in the declaration, was to insure the premises against fire *in the name of the plaintiff*, in £550 at least, in some British or Canadian insurance office.

If this be a covenant running with the land, so as to charge on that principle the assignee of the lessee, then it makes no difference that the lessee in this case does not seem

to have covenanted for himself and *his assigns*. We take this clearly to be such a covenant. It respected the property demised, and was not merely to do some collateral thing independent of it. The buildings were to be insured in the name of the lessor, who was bound by the lease to expend the money that should be recovered under the policy in the case of loss by fire in rebuilding on the demised premises. It had the same effect, therefore, as a covenant to repair, to the extent at least of laying out so much money, for the lessor thus secured himself by it to that extent, if the lessee should keep his covenant.

I refer to Platt on Covenants 183, 186-7, 189 ; Doe dem. Knight v. Rowe (1 Ry. & Moo. 343); also to Vernon v. Smith (5 B. & Al. 1).

We think it can admit of no doubt, that upon the statement of this covenant in the declaration the lessee's assignee was liable upon it, and that judgment must be for the plaintiff.

Judgment for plaintiff on demurrer.

Besides the demurrer to the declaration, there were the following pleas :

1. That the defendant did not covenant in manner and for, &c.

2. That the defendant did keep the premises in a good and tenantable state of repair till the first of March, 1857, when the buildings were burnt down by accident, and that before a reasonable time had elapsed for rebuilding, &c., the plaintiff entered and ousted defendant, and prevented him from repairing or rebuilding, &c.

3. To the same breach for not repairing, that defendant did keep the premises in repair till the 1st of March, 1857, when they were destroyed by fire, &c., (as in the last plea), and that it was provided by the lease that in case of such destruction by fire, the house, &c., should be rebuilt by the plaintiff.

4. As to not leaving the premises in good repair at the end of the term, that the term was not determined by lapse of time, or by consent of defendant, and that defendant did

not leave the premises voluntarily, but on the contrary the plaintiff entered with force and arms, and evicted the defendant.

The plaintiff took issue upon all the pleas.

The lease was made on the 1st of July, 1855, between the plaintiff as landlord and one William Smith as tenant, to hold to Smith, his executors, administrators and assigns, for twelve years from the 1st of September, 1854, at £100 a year, payable half-yearly, in advance, &c., besides taxes.

The lessee covenanted for himself, his heirs, executors, and administrators, that he, his executors, administrators and assigns, should pay rent and taxes, and should erect a certain addition to the house at the plaintiff's expense; and to pay as additional rent twelve per cent. upon the cost of such addition.

The lessee also covenanted not to underlet or assign without the plaintiff's consent in writing, and to commit no voluntary waste; "and further that he will at all times during the term, keep the fences, houses and buildings, in good and tenantable state of repair, and the said buildings, fences, and houses, so being repaired, shall and will, at the end, expiration, or other sooner determination of the said term, which shall first happen, peaceably and quietly leave and surrender and yield up all and every part thereof unto the party of the first part, his heirs, &c., without the payment, or allowance by the party of the first part of any sum or sums of money whatsoever."

And that he, the said party of the second part (the lessee), should insure and keep insured the buildings and erections upon the said premises during the said term, in the sum of £550, at least, in the name of the said party of the first part (the plaintiff), his heirs, &c., in some respectable British or Canadian insurance office having an office or agency in the city of Toronto; and in default of so doing, the said party of the first part, his heirs, &c., might insure the same, and charge the premium and expenses paid for so doing as rent against the party of the second part, his heirs, executors, administrators and assigns, and levy the same by distress or otherwise; and it was further agreed between the

said parties, that if the erection and buildings now erected, or to be erected on the said premises, should be consumed or destroyed, then the said rent should cease until the premises could be reasonably rebuilt; and further, that if the said party of the first part should receive the insurance money, he should not be compelled to expend in the erection of new buildings anything beyond the amount so received for such insurance as aforesaid; and it was further agreed, that upon the full amount of the insurance money so received being expended, then the rent should commence again, and be payable as aforesaid, from such period, by the party of the second part.

The plaintiff covenanted for quiet enjoyment by the lessee in case he should pay the rent, and perform all the covenants on his part, with provision for forfeiture of the term in case the rent should be unpaid for forty days, &c., or of breach of any of the lessee's covenants, by himself, his heirs, executors and administrators.

At the trial, at Toronto, before *Draper*, C. J., it was proved that all the buildings and out-buildings were burned on the 2nd of March, 1857, and that it would take £500 or £600 to rebuild them. The plaintiff waited three months to see if the defendant would rebuild, and finding that he took no steps towards it, he contracted with a builder to put up buildings of rather a better kind, for which he was to pay £700. The defendant saw the work going on, and did not object.

The learned Chief Justice recommended that the jury should give a verdict for the plaintiff, which was taken subject to the opinion of this court on any objections to be raised by the defendant on the record and evidence. It was left, however, to the jury to say whether a reasonable time for rebuilding had expired, and they were told that the value of the premises at the time of the fire was the proper measure of damages. The jury gave their verdict for the plaintiff, for £550, the sum in which the defendant ought to have insured.

McMichael obtained a rule *nisi* for a new trial, on the law and evidence, and for misdirection, in holding that the cove-

nant to insure ran with the land; also for excessive damages, given in consequence of misdirection in regard to the proper measure of damages, the jury being directed that by the covenant to insure for £550, the parties had fixed the lowest value of the building, and that the plaintiff was entitled to recover that at least, whereas he was only entitled to recover the amount of such premiums as the plaintiff might pay for insurance, and the insurance money was to be laid out in rebuilding: and the defendant was entitled to the occupation of the premises for the residue of the term, and being evicted before, it was incorrect to measure the plaintiff's damage by the amount of insurance.

C. S. Patterson shewed cause, citing *Digby v. Atkinson*, 4 Camp. 278; *Penniall v. Harborne*, 11 Q. B. 368; *Doe Pittman v. Sutton*, 9 C. & P. 706; *Leeds v. Cheetham*, 1 Sim. 146.

M. C. Cameron supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

We see no ground on which the propriety of the verdict can be questioned. The parties understood, apparently, that the matter to be contested at the trial was the question of this defendant's liability upon the covenant of the lessee to insure, and the damages that could be properly claimed in case he should be held to be liable. The damages given were clearly on account of what was destroyed by fire. The verdict is general: and if it is of any consequence to have a distinct finding recorded upon each issue, which does not seem to have been insisted upon at the trial, the verdict could be amended in that respect.

As to the plaintiff's right to recover £550, which the jury have given to him. On the demurrer we have given our opinion in the plaintiff's favour upon the question of defendant's liability on the covenant to insure, as a covenant running with the land, and if that is thought to admit of any question, the opinion of another court can be easily taken upon it.

Here the defendant did not insure, as we think the jury were warranted in concluding under the circumstances. If

there had been any policy effected by him, we should undoubtedly have heard of it, and indeed the defendant did not deny that breach, and if he had averred performance, the proof of it would have lain upon him.

The jury were properly told that the measure of damages was strictly the value of the property which the defendant was to have insured, because more could not have been recovered under the policy if he had insured. There is no reason to suppose the buildings were over-valued, and the lessee, by his covenant, concurred in adopting that as a sum that might properly be insured.

There is no force, we think, in the objection, that as the plaintiff was at liberty to insure, if the lessee did not, and to charge the premium as additional rent, that was a condition or option reserved for the plaintiff's benefit; but he was not the less at liberty, if he was satisfied that the tenant was responsible, (and there could be no assignment of the lease without his written consent,) to repose upon his covenant, and to give himself no trouble about it, but leave the tenant to keep the buildings insured at his peril. As to what was said of eviction by the landlord, by entering and rebuilding with his own means after the fire, there was no wrong done to the tenant by that. He seems by the evidence to have given himself no concern about the premises after the fire, and the landlord, after waiting three months, took possession and rebuilt.

The term was forfeited under the conditions in the lease by the defendant not having insured, and the landlord had a right to enter. If he did anything wrong in this respect however, the tenant has a proper remedy for that. It should not interfere with the landlord's claim to damages, which are rightly estimated upon the extent of his loss in consequence of the defendant's breach of his contract.

Rule discharged.

ANGLIN V. THE MUNICIPALITY OF THE TOWNSHIP OF KINGSTON.

Municipal corporations—Illegality of by-law pleaded to action on debentures—How far a defence against bona fide holder—Repleader—Appeal—8 Vic., ch. 13, sec. 57.

The plaintiff sued a municipal corporation on two debentures issued by them. Defendants pleaded that the debentures were issued under a by-law, which was illegal for want of compliance with the directions of the statute, and that the debentures therefore were not binding on them. The plaintiff replied that he was a *bona fide* holder for value, and without notice of the illegality; and upon this issue the jury in the County Court found in the plaintiff's favour. The learned judge refused to grant a re-pleader, and upon appeal—*Held*, that he was right, for a repleader is granted only to advance substantial justice.

Quære, whether the refusal to grant a repleader is an appealable matter.

APPEAL from the County Court of the united Counties of Frontenac, Lennox and Addington.

Henderson, for the appellants, cited the *Canada Company v. Municipal Council of Middlesex*, 10 U. C. R. 93; *Billings and the Municipal Council of Gloucester*, *Ib.* 273; *Hill and The Municipal Council of Walsingham*, 9 U. C. R. 310; *Mellish v. Town Council of Brantford*, 2 C. P. 35; 12 Vic., ch. 81, secs. 176, 177.

Kirkpatrick, Q. C., for the respondents, cited *Ch. Arch. Prac.* 1456; *Symmers v. Regein*, *Cowp.* 510; *Goodburne v. Bowman*, 9 Bing. 532; *Atkinson v. Davies*, 11 M. & W. 236; *Gwynne v. Brunell*, 6 Bing. N. C. 453.

The facts of the case are sufficiently stated in the judgment.

ROBINSON, J., delivered the judgment of the court.

The plaintiff declared upon two debentures issued by the defendants, made payable to one Samuel Smith, or bearer, for £25 each.

The defendants plead in bar, that the debentures were issued upon a by-law, which was illegal, for want of its compliance with the requisitions of the law in that behalf (setting out the informality, which is that no special rate was settled by said by-law to be levied in each year for payment of the debt created): that in consequence of such defects the debentures issued under the by-law are void, and not binding upon them. This is a defence which does not come with a good grace from the corporation, considering that

the by-law was passed by themselves, and the debentures issued by themselves, and considering also that the debentures were issued six years ago, and, as we may assume, issued to secure the amount of money mentioned in them, which at the time passed into their hands. There is nothing on the face of the debentures, as set out, to enable any one taking them to see under what by-law, or for what purpose they were issued; and it is plain that these debentures would ill answer their purpose, unless they could be taken freely, and with confidence, by persons at a distance from the municipality which issued them, and especially after they had been for years afloat in the commercial world. Yet we must consider that these defendants are in a different situation from what an individual would be in setting up such a defence to an undertaking of his upon which he had raised money for his own use, for if the by-law under which these debentures are issued be in fact illegal, the rate-payers may apply to have it quashed, and then the corporation would be left without the means of paying off the debentures.

The plaintiff answers the plea by stating that he became the holder of the debentures *bona fide*, paying the value for them, without notice of any such illegality as is stated, and he assumes it to be a legal inference from that statement that the debentures cannot be treated by defendants as being void in his hands.

The defendants do not question the legal inference which he assumes from the fact pleaded, as they might have done by demurring to his plea, but they join issue with him upon his plea, in the ordinary manner, thereby denying that the facts on which he grounds his defence are truly stated.

Upon the evidence, the jury found that it was true, as the plaintiff had pleaded, that he took the debentures in good faith, for value, and without notice, and therefore found, as we think they should have done, that the plaintiff has proved his replication. Whether it was a good legal answer to the defendants' plea, or not, was not a question for the jury.

The defendants afterwards moved the judge of the County Court in term for a new trial, or for a re-pleader, or to arrest

the judgment. The judge refused the application, and his judgment is appealed from.

We think he did right not to grant a new trial, because the evidence supported the truth of the plaintiff's statement, on which the only issue in fact was found; and we think he did right in refusing a re-pleader, if that be an appealable matter under 8 Vic. ch. 13, sec. 57, because that would have been to interpose in the defendants' favour, not in order to advance justice, but contrary to the substantial justice of the case.

For all that appears, the defendants may not only have got the money upon the debentures when they issued them (as we cannot doubt they did), but they may have raised the money long ago under their by-law, to enable them to pay it.

We have looked carefully at the case in the Common Pleas of *Mellish v. The Municipality of Brantford* (2 C. P. 35). That was upon demurrer, and the question therefore was presented in its strictest form. Here the question is, whether there was misdirection in holding that the facts stated in the replication were proved, and there certainly was no misdirection in that respect.

The defendants might have raised an issue in law, as to their liability under that statement of facts, but they did not; and if they had, the question that would have been presented in this case would not have been the same, for there the party suing was the original contracting party with the corporation, not the holder of a negotiable security. Both these cases, however, suggest considerations of great consequence to the public, which may not, we fear, have received all that attention in the legislature which they seem to require.

The rule moved in this case was, we think, rightly disposed of in the county court, and the appeal must therefore be dismissed with costs.

Appeal dismissed.

PAPPS V. MELVILLE ET AL.

Covenant to perform carpenter's work on house—Default in completion by time specified—Action for penalty—Delay caused by the masons employed by plaintiff—Pleading.

Declaration. First count—That defendants agreed to perform all the carpenter's, joiner's, and tinsmith's work, required to complete a certain house then about to be erected by the defendants for the plaintiff, for £294, and to finish said works by the 23rd of December, and to pay the plaintiff £10 per week as liquidated damages for each week after that day until the completion of such work; and that, although defendants completed the work, and received £290 on account, and recovered judgment against the plaintiff for the residue, which judgment is still in force, yet ten weeks after the said 23rd of December elapsed before the said work was finished.

Plea, that defendants would have completed the work within the time specified therefor, but were delayed by the masons employed by the plaintiff to build the brick-work of said house, and were thereby, without any default on their part, hindered and prevented from completing said work within such time.

Held, on demurrer, plea good, for although it was not stated in the declaration that the plaintiff was to do the brick-work, yet nothing appeared necessarily inconsistent therewith, and it was distinctly averred in the plea, so that an issue taken thereon must have led to a determination of the case on the merits.

Held, also, that the defence set up was clearly good.

The plaintiff, by his declaration, alleged in the first count, that the defendants, by deed dated the second day of August, 1856, covenanted with the plaintiff to do and perform the whole of the carpenter's, joiner's, and tinsmith's work, necessary to complete a certain house on Hannah street, in the city of Hamilton, then about to be erected by the defendants for the plaintiff, according to certain plans and specifications, &c., in that behalf prepared by one W. T., architect, &c., for the sum of £294, to be paid in a certain manner and at certain times in such deed specified, as by reference thereto will fully appear, and to complete the whole of the work so to be performed by the defendants on or before the twenty-third day of December of the last mentioned year, and to pay the plaintiff £10 per week as fixed and liquidated damages, and not as a penalty, for each week ensuing the said twenty-third day of December of last mentioned year, until such works to be performed by the defendants as aforesaid should be completed: and that, although the defendants did complete the said works after the date of the said deed, and although the plaintiff paid to the defendants, and the defendants accepted and received from the plaintiff, a portion of

the said £294 therefor, as above stipulated, to wit, the sum of £290, parcel thereof, and recovered judgment against the plaintiff in the court of Queen's Bench for the residue thereof, which judgment is still in force, yet the defendants did not complete the said works on or before the said twenty-third day of December last mentioned, and that a large number of weeks, to wit, ten weeks, ensuing such twenty-third day of December, elapsed before such works were completed.

Second count—That the defendants, being co-partners in the trade and business of carpenters and joiners, in the course of their said trade and business, on the second day of August, 1856, agreed with the plaintiff to erect and complete all that appertained to their said trade and business of a certain other house on Hannah and Hughson streets, in the city of Hamilton, according to certain designs, &c., prepared by one W. T., architect, for the plaintiff, for the sum of £294, payable to the defendants in that behalf, and to complete the same on or before the first day of January, 1857, and to pay to the plaintiff for each and every week ensuing such first day of January, during which the same should remain incomplete, the sum of ten pounds per week as fixed and liquidated damages, and not in the nature of a penalty : and the plaintiff says, that although the defendants did erect and complete all that appertained to the said trade and business of the said house as above stipulated, and were paid and received a portion of said price therefor, to wit, £290, and recovered judgment for the residue thereof in the Court of Queen's Bench against the plaintiff, which judgment is still in force, yet the defendants did not nor would complete the same on or before the said first of January, and the period of ten weeks ensuing that day elapsed before the defendants completed the same, whereby the plaintiff suffered a great damage, to wit, to the extent of ten pounds during each and every of such weeks.

The defendants pleaded—2. That after the making of the said deed in that count mentioned the defendants were ready and willing to proceed with the work to be performed by them on and about the said house, and would have completed the

same within the time therein specified for the completion thereof, but were, after the making of the said deed, detained for a long space of time by the mason employed by the plaintiff in building the brick-work of the said house, and for a further long space of time by the plasterers employed by him in plastering the same; and the defendants were thereby, without any default on their part, hindered and prevented from completing the said work within the time so specified.

3. And as to the second count, the defendants say, that the defendants were always, after the making of the deed mentioned, ready and willing to proceed with the works thereby contracted by them to be performed, and would have completed the same within the period therein specified, but were hindered and delayed by the plaintiff and his servants and agents, by whom certain portions of the said building were to be built and constructed in time to enable the defendants to proceed with their portion of the work, so as to complete the same within the time so specified: and the defendants say, that but for such hindrance and delay, the work by them contracted to be performed would have been so completed within the time thereby provided.

The plaintiff demurred to these pleas. The grounds of demurrer relied upon sufficiently appear from the judgment.

Martin, for the demurrer, cited *Macintosh v. Midland R. W. Co.*, 14 M. & W. 557; *Atkins v. Kinnier*, 4 Ex. 776; *Irving v. Manning*, 6 C. B. 391; *Cannock v. Jones*, 3 Ex. 233; *Gould v. Webb* 4 E. & B. 942; *Martyn v. Clue*, 18 Q. B. 661.

Eccles, Q. C., contra, cited *Rawlinson v. Clark*, 14 M. & W. 186; *Watson v. O'Beirne*, 7 U. C. R. 345; *Holme v. Guppy*, 3 M. & W. 387; *Melville v. Carpenter*, 4 C. P. 159.

ROBINSON, C. J., delivered the judgment of the court.

The special plea to the first count would clearly not have been good upon special demurrer, but whether it is in substance a sufficient answer is now the question.

We think we must understand, from the statement in the first count, that the £294 was to be paid to the defendants

for the carpenter's, joiner's and tinsmith's work, which they had covenanted to do by the 23rd of December, and not for building the house altogether, which it is not averred in the first count that the defendants had covenanted to build either by the 23rd of December or at any time; but merely as a fact it is stated that the house in which the defendants were to do the stipulated carpenter's work, &c., was a house that was then about to be erected by the defendants for the plaintiff.

If the defendants were to build the house—that is, were under a contract to erect and complete the house—it would seem to follow as a consequence, that it must have been under their control as to the time of going on with the work, unless indeed the plaintiff, and not the defendants, were to find materials, in which case there might be a delay for which the defendants could not be held answerable.

If the defendants had the control of the whole work, and not merely of the carpenter's work, &c., then one does not see how the plaintiff could have had any thing to do in the employment of men to do the brick-work and plastering. Yet we are to consider, on the other hand, that when the plaintiff in the first count speaks of the house as one then to be erected by the defendants for the plaintiff, he does not aver that defendants were under any contract to put up the house for him, and may mean nothing more than that such was the intention.

It is not absolutely inconsistent with these words, used merely to describe the house, that the defendants were to be the architects, and have the general direction of the work, while the plaintiff reserved to himself the finding materials and workmen to do such parts of it under defendants' directions as were not within their line as carpenters; and in that case it might happen that the defendants, relying on the plaintiff keeping his time in regard to what he had undertaken to have done, ventured to covenant for what alone they had bound themselves to execute, namely, the carpenter's work, &c., and that it should be completed by the 23rd of December.

The defendants, by their plea, rest the defence on the

fact that the plaintiff was behind with the wood-work and plastering: that the men employed by him to do it had it not done in such time as left it possible for the defendants to do the carpenter's work, &c., which they had covenanted to do by the 23rd of December, and that so, without any default of theirs, they could not keep the day.

Now we have, on the one hand, the defendants relying as an excuse, on the plaintiff's not having done in time the brick-work and plastering, which, according to the way in which the plaintiff has set out the agreement, it would appear were to be done by the defendants themselves; and this, too, without any explanation given in the plea to account for what would seem to be a repugnancy between the declaration and the plea in this respect, though one can see that the apparent repugnancy might have been explained away in several ways, according to the facts of the case, so as to leave the plea free from exception in that respect.

On the other hand, we have to consider that the defendants aver as a fact, that the plaintiff did employ men to do the brick-work and plastering; and also, as a fact, that from the delay of the men so employed by the plaintiff, they were, *without any default of theirs*, disabled from completing the carpenter's work by the day that had been appointed.

Now if the plaintiff, instead of demurring, had denied the truth of that defence, the defendants would have had to shew that the plaintiff had in fact been carrying on the brick-work and plastering by his own workmen, and that that work was delayed without any fault of the defendants. The evidence which either party could have given on those points must have opened to the jury the whole truth of the case. The defendants could not have sustained their plea without shewing the truth of both their averments; and though the establishing the averments would seem at first sight to be inconsistent with the plaintiff's reference to the house as one that was to be built by the *defendants*, yet it would not necessarily be inconsistent, for it might be explained in various ways how the brick-work came to be in fact going on under the plaintiff's control, and not under the defendants'.

Besides, it is to be considered that whatever repugnancy

there may be in the absence of explanation, is not a repugnancy between two statements made by the defendants, but between something which they have directly affirmed, and another matter which the plaintiff has alluded to by way of reference merely, in order to identify the subject matter of the contract.

We think, on the footing on which pleadings are now put by the 99th clause of the Common Law Procedure Act, we can properly uphold this plea, as one that must necessarily have led to the determination of the case upon the merits, if the plaintiff had taken issue upon it.

Upon the third plea, which sets up the same defence to the second count, we have no doubt. It is, in our opinion, sufficient; for the second count, to which that is pleaded as a defence, does not speak of the house as one that was about to be erected by the defendants, wherefore there is no apparent repugnancy between the declaration and plea in that respect; and the only question is, whether the defendants, having contracted to do by a certain day all the carpenter's and joiner's work to a certain house to be built for the plaintiff, or to pay a certain penalty for each week's delay after that day, are excused from the penalty by the fact of the plaintiff not having the other parts of the work, to which the carpenter's work was to be applied, done in time to admit of the defendants keeping their contract.

We are clear that such a plea is a good legal defence. The defendants could not do all that appertained to their trade as joiners by the 1st of January to a house of the plaintiff's which was not then existing.

There is in the second count nothing to shew that the defendants were to do anything but the carpenter's work, and they could only do that description of work to a house that should then be ready to receive it. For all that appears in this count the plaintiff took on himself the responsibility of having the house ready for the work which the defendants were to do, and the agreement cannot, consistently with common sense, be understood to have been made upon any other footing.

We refer to Comyn's Digest, "Covenant" F., in which

are many authorities cited, affirming the principle, that where the foundation of a covenant fails, the covenant also fails. If after this agreement was entered into the plaintiff had not gone on at all, but had abandoned his intention of building, then there would have been nothing for the defendants to do, either within the intention or letter of their covenant; and the effect would be the same if he did go on with the house, but had it not ready at such a time as made it possible for the defendants to keep their time. The case cited of *Holme v. Guppy* (3 M. & W. 387) is in point.

In our opinion the defendants are entitled to judgment on both pleas, though we do not take the point to be so clear upon the second plea as upon the third.

The cases cited by Mr. *Martin* are not like the present, not being cases in which there was something to be created by the plaintiff before the covenant on which he is suing could attach.

Judgment for defendants on demurrer.

LESLIE v. MORRISON.

Notice to produce—Form of—Evidence—Letters—Estoppel.

Plaintiff sued defendant for the price of some fruit trees, and the defence was that they had not been purchased by defendant, but received to sell upon commission or the plaintiff. Defendant had given a notice to produce "the several documents hereunder specified, and all other documents, letters," &c., "relating to the matters in question in this cause;" the schedule specified all letters, &c., "and particularly certain orders given by defendant to plaintiff to forward the trees which the defendant was to sell for the plaintiff under the agreement between them, and which orders are dated in or about March, 1856." *Held*, sufficient to let in secondary evidence of a letter written by defendant to plaintiff in March, requiring trees to be sent by a certain time.

Held, also, that defendant having put in a letter from the plaintiff to establish that he had received the trees for sale, was not bound by the plaintiff's statement in the same letter of the amount due for such trees.

Assumpsit on common counts.

Pleas, non-assumpsit, payment, and set off.

At the trial, at Toronto, before *Draper*, C. J., it appeared that the action was brought for the price of a large number of fruit trees sent to him from the plaintiff's nursery near Toronto, in the spring of 1856, addressed to the defendant at Chatham.

The plaintiff charged him with those trees at the selling price by retail, abating twenty-five per cent., and giving him credit for some notes, which the defendant had taken from the purchasers of the trees, and forwarded to the plaintiff.

The plaintiff treated the transaction as a sale by him to defendant of the trees on the terms mentioned.

The defendant, on the other hand, contended that he did not buy the trees, but was engaged by the plaintiff to act as his agent in selling them on commission: that he was to receive twenty-five per cent. upon the sale, and to remit notes taken from the buyers; and his defence, as to such of the trees sent to him as remained unaccounted for, was that he had sent orders for them in March, requesting them to be sent so as to arrive at Chatham not later than the 15th of April: that they did not arrive at the Chatham station till the 29th of April: that on account of the lateness of the season he could get but few of them sold, and had the rest carefully planted in a nursery, where almost all of them died; and that he wrote to the plaintiff a particular account of the matter in July, 1856, but got no answer to it.

On the trial the defendant called for this letter, having given a notice to produce it. The plaintiff objected that the notice was not in terms sufficiently explicit to entitle the defendant to call for any particular letter, and it was not produced. The learned Chief Justice concurred in that view of the notice, and secondary evidence of the contents of the letter was in consequence rejected.

The notice was in these terms: "You are hereby required to produce," &c., "the several documents hereunder specified, and all other documents, letters, deeds, books, papers and writings whatsoever, containing any entry, memorandum or minute, or other matter in anywise relating to the matters in question in this cause." The notice was admitted to have been duly served. In the schedule under the notice was the following specification: "all letters and papers written by defendant, and sent or given to the plaintiff, relating to the matters in question in this suit, and particularly certain orders given by the defendant to the plaintiff to forward the trees and shrubs which the defendant was

to sell for the plaintiff under the agreement between them, and which orders were dated in or about March, 1856."

The jury found for the plaintiff £50.

Freeland obtained a rule *nisi* for a new trial for the improper reception of evidence, and on affidavits.

Adam Wilson, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We suggest to the parties that this is a case which it would be most advisable to settle by arbitration, rather than continue a litigation about an amount not large, and where the facts which the defendant relies on could be more conveniently inquired into before arbitrators having the parties before them.

If we have to determine upon this application, we must hold that the secondary evidence of the defendant's letter to the plaintiff, accounting for what he had done with the trees sent up to Chatham in April, ought to have been received. The learned judge thought the notice to produce was too general in its terms, and therefore excluded the secondary evidence; but the notice was sufficiently particular, as indeed seems to be conceded, and the contents of the letter in question should therefore have been allowed to be proved; and it appears from the statement which we have of it in Mr Johnson's affidavit, and it was material for the defendant to be able to prove that he had written such a letter to the plaintiff.

The learned Chief Justice seems also to have considered, that the defendant having put in a letter of the plaintiff's to him for the purpose of establishing that he received the fruit trees on the footing of an agent to sell on commission, and not as being sold to himself, could scarcely be allowed to dispute the correctness of the plaintiff's statement in the same letter of the amount which he deemed to be due to him for the trees; but though the plaintiff was entitled to have the whole letter read, it did not follow that the defendant would be bound by any statements which the plaintiff might have made in his own favour. We think, if the parties cannot otherwise settle this, we must grant a new trial, with costs to abide the event.

Rule absolute.

WILLIAM BACHELOR COLTMAN, FRANCIS JOSEPH COLTMAN,
AND SCHUYLER SHIBLEY V. BROWN.

Proof of will executed out of U. C.—16 Vic., ch. 19, sec. 5—“Her Majesty’s possessions”—Notice of title.

The words “Her Majesty’s possessions out of Upper Canada” used in 16 Vic., ch. 19, sec. 5, include England; and it was held, therefore, that the probate of a will executed there, under the seal of the Prerogative Court of Canada, was properly received in evidence.

In notices of title in ejectment, under the C. L. P. A., secs. 222, 224, it is only necessary to state how the party claims, as by conveyance, descent, &c., and from whom, without exhibiting the whole chain of title.

EJECTMENT, for the east half of lot No. 18, in the 7th concession of Portland.

The first two plaintiffs claimed as devisees of the late Sir Thomas Coltman, and the other plaintiff as grantee from them.

At the trial, at Kingston, before *Richards, J.*, it was objected that the production of the probate of Sir Thomas Coltman’s will, under the seal of the Prerogative Court of Canterbury, did not constitute legal evidence of the will under our statute 16 Vic., ch. 19, sec. 5, because the terms used in that act, “Her Majesty’s possessions,” do not embrace England, but the foreign possessions of the crown only.

The will bore date on the 22nd of February, 1842, and devised all the testator’s land in Canada to his sons, the first two plaintiffs; the probate bore date the 20th of July, 1849.

There had been notices served on the defendant, one under the statute 16 Vic., ch. 19, sec. 5, that the plaintiffs intended to produce and use the probate of the will of Sir Thomas Coltman, instead of the will itself, giving the date of the will and probate; and a notice that the first two plaintiffs claimed as devisees under that will, and the other plaintiff as their grantee. The learned judge allowed this latter notice to be amended by stating that the plaintiff’s title was under a patent to John Evans, a deed from him to Charles Stuart, who conveyed to John Cummings, who conveyed to Matthew Bell and Edward Hall, who conveyed to Sir Thomas Coltman, the devisor.

A verdict having been rendered for the plaintiffs.

Henderson obtained a rule *nisi* for a new trial. He renewed the exception taken at *nisi prius* to the proof of Sir

Thomas Coltman's will, citing 17 & 18 Vic., ch. 54, (Imperial); 8 & 9 Vic., ch. 93, sec. 61 (Imperial); Steph. Com. I. 98; Rex v. Vaughan, 4 Burr. 2500; and objected that the amendment of the notice should not have been allowed.

Kirkpatrick, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

As to the first exception, upon the effect of our statute 16 Vic., ch. 19, secs. 5, 6, 7, we think the words used in the 5th clause, "in any of her Majesty's possessions out of Upper Canada" may be construed to extend to England or other parts of the united kingdom. The word *possessions* is an expression more generally used in acts of parliament when the plain and expressed intention is to confine it to British possessions abroad; that is, out of the united kingdom; but where that is the case, the word "abroad" is usually added. This is an act which should receive a liberal construction, as it is to facilitate legal proceedings, and avoid unnecessary expense. We cannot imagine that the legislature desired that our courts of justice should place less confidence in probates of wills granted in England than those granted in British colonies. The object of affording the facility of proof applies in the one case as well as in the other, and quite as forcibly: and as the term "possessions of her Majesty" will, without any stretch of construction, include England, we think the probate from the Prerogative Court of Canterbury was properly received.

We are also of opinion that the plaintiffs' notice of the title, stating under what assurance and from whom they immediately hold, was sufficient, without going back to the origin of the title, and tracing it from the patent. We have observed such notices to be given sometimes on the one principle and sometimes on the other. Our opinion is that nothing more is necessary than to state, as in this case, whether the plaintiff or defendant claims by conveyance to himself, and from whom, or by descent, marriage, devise, &c., and from whom, and that he need not go back in order to exhibit a chain of title from the patent. If it were otherwise, the party might have to disclose beforehand some break

or flaw in his chain of title. It is enough, we think, that he should state the nature of his title, not the several steps of it.

We think the rule *nisi* should be discharged.

Rule discharged.

THE PROVINCIAL INSURANCE COMPANY V. THE ÆTNA
INSURANCE COMPANY.

*Insurance—Re-insurance—Construction of policy—Action brought too late—
Computation of time.*

Plaintiff having insured a steamer for £1500, re-assured with defendants for £500, under a policy which provided that no suit should be maintained thereon unless commenced “within the term of twelve months next after any loss or damage shall occur.” The steamer was injured in November, 1854, and the plaintiffs, having paid the amount claimed on the 9th of August, 1855, brought this action on the 8th of August, 1856, to recover from the defendants their proportion.

Held, too late, for that “the loss or damage” referred to in the defendants’ policy was the injury to the vessel, not the payment by the plaintiffs.

Whether under the other construction the action would have been in time, was a question raised but not decided.

The plaintiffs sued the defendants on a policy of assurance entered into by defendants on the 14th of September, 1854, whereby they insured £500 on the steamer “B. F. Tibbetts,” navigating the waters between Quebec and the river Trent, from the 30th of August to the 30th of November, 1854, in which policy it was declared that the same was to be subject to such risks, valuations and conditions, as were or might be taken by the said plaintiffs, and the loss, if any, was to be payable by the defendants at the same time. The declaration averred a loss within the policy granted by the defendants to the full amount insured, and that the plaintiffs were at the time interested in the steamboat to that amount.

The defendants pleaded, among other pleas not now material, that it was a condition of the policy sued on, that no action should be brought upon it unless commenced within twelve months after the loss or damage; and that in this case the plaintiffs’ loss and damage occurred more than twelve months before the commencement of this suit.

At the trial, at Toronto, before *Robinson*, C. J., it was proved that on the 2nd of May, 1854, the plaintiffs insured

£1000 on the steamer "B. F. Tibbetts," and on the 30th of August, 1854, £500, both policies extending to the 30th of November.

The policy sued in this action was made on the 14th of September, 1854, for £500, for the same period, and against the same risks.

The premium paid was £21 7s. 6d.

This policy contained a condition "that no suit or action against the said company for the recovery of any claim upon, under, or by virtue of the policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and that, in case any such suit or action shall be commenced against the said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." And in the margin of the policy it was stated, "This policy is to be subject to such risks, valuations and conditions, as are or may be taken by the said Provincial Insurance Company; and the loss, if any, payable at the same time."

The steamer, it appeared by a protest made before a notary in Quebec on the 5th of June, 1855, by the master and pilot, was damaged in the river St. Lawrence at a cove, by being obliged to part from her moorings, in order to avoid some cribs of timber that were descending the river, and by running aground in the attempt.

The damage which was claimed from the plaintiffs in consequence was £214 12s., as adjusted on a valuation, which would make the claim on the defendants as re-assurers of £500, or one-third of the £1500 taken by the plaintiffs, £7 10s 8d.

On the 25th of July, 1856, the plaintiffs having paid the £214 12s. demanded the £71 10s. 8d. from the defendants, in a letter in which was stated merely the amount of loss paid by the plaintiffs, and the amount claimed by them from the defendants. The defendants objected to pay, and this action was in consequence commenced on the 8th of August, 1856.

It was proved that the plaintiffs' agent at Quebec received the protest describing the damage in June, 1855, and forwarded it to the plaintiffs at Toronto, who paid the £214 12s. to the owner of the steamer, on the 9th of August, 1855. The plaintiffs claimed interest from that time on the defendants' one-third, £71 10s. 8d.

The plaintiffs' marine inspector was examined at the trial. He swore that the accident occurred on the 6th of November, 1854, and that he made a report of it to the plaintiffs, but could not say at what time, though, as the accounts of the damages given to him were dated the 11th of June, 1855, he supposed it must have been after that.

He swore that the usage in cases of re-assurance was always to send in the amount of the loss to the first insurers: that the re-insurers call for no proofs, but rely on the adjustment made with the first insurers; but he stated that they had had but five or six cases of re-insurance.

For the defendants it was objected that this action should have been brought within twelve months next *after the loss*; that is, after the injury to the vessel as provided in the policy sued upon, and if so, it was clearly too late, for the damage was sustained in November, 1854. But if the computation was to be made not from the time of the loss, but from the time that the plaintiffs paid the amount claimed from them, then, as the plaintiffs paid on the 9th of August, 1855, and this action was brought on the 8th of August, 1856, it was still questioned whether this action was in time.

A general verdict was given for defendants, and leave was reserved to the plaintiffs, by consent, to move to enter a verdict in their favour for £79 3s. 8d.

J. Duggan obtained a rule *nisi* accordingly, to which *Richards* shewed cause.

Arnould on Insurance, 288, 289, 70, 75, 1314; 12 Vic. 167, sec. 15, were referred to on the argument.

ROBINSON, C. J., delivered the judgment of the court.

Re-insurance, though prohibited in England, except under certain circumstances, by the statute 19 Geo. II., ch. 37, is allowed in regard to insurances effected by the com-

pany which is suing in this action, by the statute 12 Vic., ch. 167, sec. 15.

The first objection to the plaintiffs' recovery which was raised at the trial, and has been renewed in banc, is, that by the express terms of the policy granted by the defendants, and on which they are sued, no action can be sustained *against them* upon the present policy, unless it shall be commenced within the term of *twelve months next after any loss or damage shall occur*. The plaintiffs contend that the fair construction of that provision is, that the *loss or damage* spoken of should be taken to mean, not the loss of the vessel insured, or the damage done to her, but the loss or damage sustained by these plaintiffs as the first insurers, which occurs as soon as they have paid the money claimed from them in consequence of the loss or damage to the vessel, and not before; and that upon that construction the action is brought in time, for the plaintiffs paid on the 9th of August, 1855, and commenced this action on the 8th of August, 1856, which is in time, whether the months be reckoned as lunar or calendar months.

The defendants answer, that even upon the construction which the plaintiffs contend for they are not in time with their action, for that, upon the general principle that a fraction of a day is not regarded in law, the twelve months had run out on the night of the 7th, and that the action brought on the 8th is not within the twelve months. They contend also, as a more decisive objection, that the words "after any loss or damage shall occur," can only be taken to refer to the casualty insured against, and upon that construction the action was unquestionably too late, because the accident occurred in November, 1854.

We think the defendants are right in this, and that upon that condition in the policy we are bound to discharge the rule, and allow the verdict to stand, which has been entered for the defendants.

Rule discharged.

TOWSLEY V. WYTHES.

Award—Evidence of submission and of execution—Interest—Construction of submission bond—Costs.

In an action on an award it is sufficient to produce the submission bond executed by defendant, without that of the plaintiff.

It is not necessary for the plaintiff to show that the award was executed by the arbitrators at the same time. That is assumed in the first instance, but defendant may shew the contrary under a plea denying the award.

Interest is usually allowed without demand made, on sums awarded to be paid at a particular time.

An agreement that all costs shall be in the power of the arbitrators, &c., inserted after the condition of the bond, must be read as part of it.

Extravagance in the amount of costs allowed by the arbitrators under such must be objected to by motion.

First count, on a bond to pay the plaintiff £20,000. Second count, for money payable by virtue of an award of certain persons, who awarded that the defendant should pay the plaintiff £8,380, and the further sum of £500. 3. For Interest. 4. On account stated.

Pleas.—1. To the first count, *non est factum*. 2. To the first count, that the bond was made subject to a certain condition (setting it out) that the defendant should observe an award to be made by certain persons named. 3. To the second count, denial of the award. 4. To the residue of the declaration, never indebted.

The replication joined issue on the first, third and fourth pleas, and to the second, replied setting out the condition of the bond, and the award made under it. Two breaches were assigned. 1. That though the plaintiff paid the expenses of the reference to the arbitrators, £630, and deducted one-third part thereof, £210, which was imposed upon the plaintiff, from £8380 awarded to the plaintiff, yet the defendant had not paid the residue of the £8,380, or any part thereof. 2. That the defendant did not pay the sum of £500, awarded to be paid to the plaintiff for the costs of reference.

The defendant took issue on the replication.

At the trial, before *Hagarty*, J., at the last assizes held at Hamilton, the award was proved by calling a witness, who proved the handwriting of the three arbitrators, the execution of the bond being admitted. The subscribing witness to the award was not called. The defendant's

agent was the only witness examined. The matters arbitrated upon were in respect of railway contracts, the defendant having the original contract, and the plaintiff being the sub-contractor. The defendant never was in this country : he lived in England, and managed all the matters by an agent. The agent referred the matters in dispute with the plaintiff to arbitration; and after the award made, the plaintiff made a demand upon the agent for the amount, who informed him that he would communicate with the defendant.

The defendant's counsel took the following objections :

1. That it was necessary to shew that all the arbitrators signed the award together, or at the same time, and that could only be properly proved by the subscribing witness.

2. That the award was not properly proved by the production of one bond—that of the defendant: that no mutuality was established; and that the part of the award respecting costs, £500, could not be enforced.

3. That interest was not recoverable without demand of the sum awarded, and that a demand upon an agent was not sufficient.

The verdict was taken for the plaintiff, as follows :

Amount of the award.....	£8380	0	0
Less proportion of arbitrators' expenses	210	0	0
	<hr/>		
	£8170	0	0
Amount of costs of reference, directed to be paid to the plaintiff.....	500	0	0
	<hr/>		
	£8670	0	0
Interest on the award.....	419	1	0
	<hr/>		
	£9089	1	0

Leave was reserved to the defendant to move to enter a nonsuit on the first point, and to reduce the verdict as respected the costs, £500, and the interest, £419 1s., if the court should be of opinion that the plaintiff could not recover.

Gwynne, Q. C., obtained a rule *nisi* accordingly.

O'Reilly, Q. C., shewed cause, and cited *C. L. P. A. 1856*, sec. 163; *Doe dem. Clarke v. Stillwell*, 8 A. & E. 645; *Carter v. Mansbridge*, Barnes 55; *Stephenson v. Browning*,

Ib. 56; Stuart v. Nicholson, 3 Bing. N. C. 113; Wohlenberg v. Lageman, 6 Taunt. 251; Tomlin v. The Mayor, &c., of Fordwich, 6 N. & M. 594; Hosier v. Searle, 2 B. & P. 299; Russell on Awards, 561.

Gwynne. Q. C., contra, cited Tay. Ev. 1353, 1217; Wade v. Dowling, 4 E. & Bl. 44; Wright v. Graham, 3 Ex. 131; Harrison v. Creswick, 13 C. B. 399, 416; Story on Agency, secs. 247, 440; Johnson v. Durant, 4 C. & P. 327.

ROBINSON, C. J., delivered the judgment of the court.

It does not seem that any action was pending at the time of the submission.

After these words at the end of the condition, "otherwise to remain in full force and virtue," it is added, "and it is further agreed between the said parties, that the said arbitrators, or any two of them, shall have full power to enlarge the time," &c., "and *that all costs shall be in the power of the arbitrators*, and the parties shall be examined on oath, if they desire it; and further, that the submission and award may be made a rule of the Court of Queen's Bench or Common Pleas."

The defendant, among other things, objects that the terms thus added form no part of the *condition* of the arbitration bond, but we think we must read them as incorporated with it, though they are added after the words with which the condition usually concludes.

We do not see any ground for nonsuit, or for granting a new trial. All that seems to call for our consideration is the item in the award of £500 for costs of the reference, which means the plaintiff's costs of making out his case, his fees to counsel, his expense of witnesses, and perhaps some fairly incidental charges, which though we see no explanation of them, the arbitrators may have known that it was just to allow.

The action was by a sub-contractor against a principal contractor for the construction of a line of railway. The claim was large, for the award in the plaintiff's favour was for a sum exceeding £8000. To establish that claim before the arbitrators it may have been necessary, for all that we

know, to call a multitude of witnesses, and to have surveys and measurements made by men of science, whose labour and loss of time must be liberally rewarded.

It seems a very large sum certainly, for it is independent of the sum paid to the arbitrators for their time and trouble, which we need not doubt required in such a case to be liberally compensated.

It was a condition of the submission that all costs should be in the power of the arbitrators; and under such a submission the arbitrators may certainly tax the costs of reference; and when they do so, as they have done here, if the party who is to pay them feels that they are undeniably excessive, he may make that a ground of moving against the award, but with little prospect of success, unless the case is an extreme one. If such an application had been made in this case, the court might perhaps have granted a rule, in order to afford an opportunity for explanation of what might seem unreasonable; but no such course having been taken, and the plaintiffs moreover having, as we understand the case, paid a portion of the other costs, thereby submitting so far to the award, we cannot say that the allowance made by the arbitrators must not prevail in a court of law in an action on the award, the submission leaving the matter in terms to the discretion of the arbitrators, and there being nothing on the face of the award, nor any thing pleaded, to make it void.

To return to the legal objections. If the defendant at the trial asked to have a verdict recorded for him on the second, third, and fourth counts, and if it be of consequence, it might be directed to be done now, with the defendant's assent.

It was not necessary to prove or produce the bond executed by the plaintiff. If it might otherwise have been made necessary, there is nothing in the issues raised to call for it.

The award no doubt should be executed by the arbitrators at the same time, not separately and apart, except under particular circumstances which might justify it. There has been no case cited to shew that it forms a necessary part of

the plaintiff's evidence to shew that the award was in fact so executed. It is always assumed to be so unless the contrary be proved, when from late decisions it would seem that such evidence, coming from the defendant, might be received on the issue raised on the plea denying the award, but none such was given here, and besides, the defendant has in part acted upon the award.

As to the allowance of interest, it has been always usual here to allow interest on sums awarded to be paid at a particular time.

Rule discharged.

TUMBLAY V. MEYERS.

Undertaking to answer for the debt of another—Statement of consideration—Statute of Frauds.

Plaintiff had worked for W. in getting out certain timber, but had not been paid in full. Defendant afterwards employed the plaintiff to get the same timber to market, promising, in addition to his ordinary wages, to pay him the arrears due by W. *Held*, not within the Statute of Frauds as an undertaking to answer for the debt of another, but a new and original promise made upon a distinct consideration of benefit to defendant.

Action on common counts, for work and labour, goods sold and delivered, money lent, money had and received, money paid, and on account stated.

Pleas, non-assumpsit, and payment.

At the trial, at Belleville, before *Richards, J.*, a special count was allowed to be added at the trial, to the effect that the defendant, on the 1st of January, 1854, in consideration that the plaintiff would work for him for a certain time in getting out and making certain timber for the defendant, promised to pay for such work, and also the amount due to the plaintiff by one W. W. Meyers, for work done before that time on the said timber: that he agreed to work and did work for defendant as aforesaid, under the said agreement for nine months, at the rate of £10 per month, and that, at the time of making the said agreement the said W. W. Meyers owed the plaintiff £100, which, with the nine months' work done for the defendant, amounted to £100, which the defendant refused to pay, &c.

It was proved that the plaintiff had been employed by W. W. Meyers in getting out lumber for him to October, 1854:

that at the time an assignment of the lumber was made by W. W. Meyers to Adam H. Meyers, who was carrying on business in connection with this defendant, and on the 4th of December following, this defendant authorized his agent to hire the plaintiff to work for him in the following spring in getting down the timber to market.

The plaintiff declined going unless the defendant would engage to pay him the arrears of wages then due to him by Wm. W. Meyers, due either wholly or in part for labour applied by the plaintiff in making the same timber. The defendant's agent and the plaintiff then settled accounts, and there was found to be due to the plaintiff from W. W. Meyers £74 14s. 3½d., for which sum the defendant's agent, who had been formerly employed by W. W. Meyers, gave the following due-bill:

"Amount due to Etienne Tumblay on settlement up to this date £74 14s. 3½d. currency, being balance of wages, and £15 for a spotted horse.

"(Signed)

W. W. MEYERS,

"Per JULIEN BISSONETTE."

"*Seymour Mills, Dec. 4th, 1854.*"

Bissonette, the agent, swore that the defendant directed him to make this arrangement, and to have the settlement with the plaintiff, and to give the plaintiff a memorandum in W. W. Meyers' name, stating the amount due to the plaintiff, in order that the defendant might be able to charge it in account with his brother W. W. Meyers (who had died since the trial). He swore also that he informed the defendant of what he had done, and he approved of it.

The plaintiff worked for defendant till June following, and the defendant had paid him his wages, but not this arrear due by his brother, W. W. Meyers, for which alone this action was brought.

Defendant's counsel moved for a nonsuit, on the ground that there was no sufficient consideration for the promise by defendant, and nothing in writing to charge him with this debt of another, as required by the statute of frauds.

A verdict was taken for the plaintiff for £87 13s. 1d., subject to the opinion of the court.

O'Hare, for the plaintiff, cited *Read v. Nash*, 1 Wils. 305; *Chitty on Con.* 447.

M. R. Vankoughnet, contra, cited *Hargreaves v Parsons*, 13 M. & W. 561; *Green v Cresswell*, 10 A. & E. 453.

ROBINSON, C. J., delivered the judgment of the court.

We think the promise proved in this case is not within the statute. Where there is a new and distinct consideration as the foundation or motive of the promise, as where the party who gives the promise derives a benefit or advantage which he did not before possess, accruing to him immediately and directly by means or in consequence of that promise (the promise not being a mere naked promise to pay the original debt on the foot of the original contract) a note in writing is not necessary, though the debt of another was the original cause of the undertaking. The law is thus laid down by Mr. Pitman in his treatise on *Principal and Surety*, page 23.

Now here the plaintiff had been getting out timber for Wm. W. Meyers, and had the demand in question upon him for his labour expended upon that timber. Wm. W. Meyers assigned the timber to Adam H. Meyers, who, according to the evidence, was jointly concerned with this defendant Elijah Meyers in the lumber business. The plaintiff being, as it is sworn, an experienced hand in getting timber down the rivers, the defendant was anxious to engage his services in that capacity, and the plaintiff stipulated with him that he would go, provided the defendant would assume—that is, not merely be answerable for it as a guarantee—but would undertake to pay him the wages due to him by Wm. Meyers, for the labour which he had expended on the timber.

The defendant, according to the evidence, undertook to do so, and to pay besides a debt of Wm. Meyers to him of £15 on another account, and in the natural course of such transactions, the assuming of this would be taken into account in the transaction with Wm. Meyers. We know, for it has been frequently proved before us in such cases, that the persons who get out timber in this country usually go down with it to market, and that their claim to be paid out of the proceeds of the timber when sold is understood to

be recognised in that description of business. It is therefore an ordinary course, when the timber is transferred in this country, that the purchaser holds himself answerable for the wages due to the men who have got it out. We do not mean to say that this is an acknowledged legal claim, where nothing is said upon the subject, but that it is a common course, where timber is transferred, for the buyer to assume any arrear of wages due to the men; and we think, where such an agreement is proved to have been made, upon the consideration that the men will continue in the service of the purchaser, and take the lumber to market for him, or on its way to market, that it is not to be treated as a naked promise to pay the debt of another, but is a new and original promise, made upon a distinct consideration of benefit to the person who makes it, and who will take care to get credit for such payment in his transaction with the vendor for the purchase.

In this case Bissonette, who had been the agent of Wm. Meyers, became afterwards the agent of the defendant, his brother, and according to his own account seems to have acted for both in the matter, for at this time Wm. Meyers was still living.

We think the rule *nisi* must be discharged.

Rule discharged.

THE TOWN COUNCIL OF THE TOWN OF WOODSTOCK V. THE WOODSTOCK AND LAKE ERIE RAILWAY AND HARBOUR CO.

19 Vic., ch. 74—Construction of—Equitable pleadings.

The Woodstock and Lake Erie Railway and Harbour Company gave a bond to the Town Council of Woodstock, reciting that the Council had agreed to lend them £25,000 to assist in constructing their railway, and conditioned that the company should not expend the loan, nor begin to construct their road, until the whole sum necessary to complete it from Woodstock to Port Dover should be obtained.

Held, that there was nothing in the 19 Vic., ch. 74, (the provisions of which are set out below) to relieve defendants from liability for a previous breach of this condition.

Declaration, that the defendants, on the 26th of July, 1853, by their bond acknowledged themselves to be bound to the plaintiffs in the penal sum of £50,000, to be paid to the said plaintiffs which said bond was and is subject to a certain con-

dition thereunder written, whereby—after reciting that the said company had determined under the act of incorporation to construct a railway from the town of Woodstock to Port Dover, on Lake Erie, and Dunnville on the Grand River, and had made application to the said municipality of the town of Woodstock, and other municipalities on the route of the said railway, for the loan of money for the purpose of assisting in the construction and completion of the said railway, and that the said municipal council of the town of Woodstock had agreed to loan to the said company the sum of £25,000 for the purposes aforesaid, under the provisions of an act of this province, entitled “An Act to establish a Consolidated Municipal Loan Fund for Upper Canada,” and that the said defendants had agreed, as security to the said municipal council for the payment of the said loan, to grant a mortgage on the said road, and also an obligation regarding the application and expenditure of the money, in the terms therein mentioned ;—*it was declared that the condition of the said obligation was such*, that if the said company should, upon payment to them by the said municipality of the town of Woodstock of the sum so to be loaned as aforesaid, and so soon as the said company should have completed the construction of the said railway from Woodstock aforesaid to Port Dover and Dunnville aforesaid, sign, seal and deliver a good and sufficient deed of mortgage of the said railway and all the real estate then belonging to the said company, &c., &c., (setting out the particulars of the mortgage to be given, which are not material to be mentioned): and also that if the said company should not undertake the construction of the said road until the whole amount of means necessary to construct the same from the said town of Woodstock to Port Dover aforesaid should be obtained, and should not expend the amount of the said loan before such means should be obtained, except so much thereof as might be requisite, in proportion with other loans from the municipalities as aforesaid, to bear the preliminary expenses of survey and other incidental expenses, then the obligation should be null and void, otherwise to be and remain in full force and virtue ; and for assigning a breach of the said condition of the

said bond and writing obligatory, the plaintiffs say that the defendants did undertake the construction of the said road before the amount of means necessary to construct the same from the said town of Woodstock to Port Dover aforesaid had been obtained, and did expend the amount of the said loan, over and above so much of the same as was requisite, in proportion with other loans from municipalities, to bear the preliminary expenses of survey, and other incidental expenses, before such means were obtained. And the plaintiffs say that the said preliminary expenses of survey, and other incidental expenses excepted in the said condition, amounted to the sum of £300. And the plaintiffs further say that the construction of the said road has never been completed, and the plaintiffs have lost the amount of the said loan ; and the plaintiffs claim £25,000.

Plea, on equitable grounds, that after the making of the said bond and alleged breach thereof, and before the commencement of this suit, a certain statute of this province was passed at the instance of the plaintiffs, and the other municipalities in the declaration mentioned, in the nineteenth year of the reign of the Queen, and chaptered therein number seventy-four, intituled "An Act to amend the incorporation of the Woodstock and Lake Erie Railway and Harbour Company," whereby certain proposals and arrangements between the plaintiffs and the said other municipalities, and the defendants, therein mentioned, and particularised in a schedule thereunder set forth, were legalised and confirmed, after the same had been approved of by the rate-payers as therein provided, which said approval has since and before this suit been legally made and given as thereby required, and the same has been acted upon, and certain acts of the directors of the said company were also thereby legalised and confirmed ; and it was thereby made lawful that any shareholder, or person holding stock in the said company, might within the time therein named, and manner therein provided, surrender the same and cease to be liable thereon, of which provision certain shareholders did since duly and legally avail themselves, and various other provisions were made respecting the dealings of the plaintiffs and said other

municipalities with the defendants, by force and virtue of which said statute, and as the legal and necessary effect thereof, the defendants say the said bond declared on became satisfied and discharged in law.

Replication, that the said statute in the said plea mentioned was passed at the instance of the defendants, and their servants and agents, and by others acting in collusion with the defendants, and as a preliminary step towards carrying out the agreement in the schedule thereof particularly mentioned and referred to, and as precedent thereto; and the said proposals and arrangements referred to in the said statute were made, proposed and offered at the instance of the defendants, and others acting in collusion with them, for the purpose of defrauding the plaintiffs: that before the said proposals and arrangements were approved of by the rate-payers of the said town of Woodstock, as provided for in the said statute, the circumstances of the defendants, by and through the gross frauds of the defendants and of others acting in collusion with them, became changed and different, and the control of the said company, by and through the gross fraud of their defendants, and their servants and agents, and others acting in collusion with them, became changed, and a board of directors were put in who were not nominated by Mr. O'Rielly in the said act named, contrary to the express provisions of the said act, and the defendants became unable to carry out the arrangements and proposals in the said plea referred to, according to the true intent and meaning of said act; and the said alleged approval of the rate-payers in the said plea mentioned was obtained and procured by the defendants, and their servants and agents, and others in collusion with them, by fraud, covin, and misrepresentation; and that, at the time of the said approval, the defendants were unable, and by their own fraud and misconduct had become unable to carry out the said proposal and arrangements in the said plea referred to, and from thence until and at the time of the commencement of this suit were unable to carry out or perform the same: and that thereupon the defendants, in consideration of the premises, and on or about the tenth day of March, 1857, wholly

abandoned the provisions of the said act, and the said proposals and arrangements, and the said alleged approval thereof as aforesaid, and the same was never performed or carried out; and it has been and is well known and understood, by and between the plaintiffs and the defendants, that the said proposals and the alleged approval thereof as aforesaid, and the said arrangements from the day and year last aforesaid, hitherto, were, for the reasons aforesaid, wholly abandoned, and both the plaintiffs and defendants have always from thence hitherto acted accordingly, and the defendants have never proceeded to carry into effect the provisions of the said act, nor to comply with any of the conditions mentioned in the said act, or in the first, second, third, fourth, fifth, sixth, seventh, and eighth clauses of the schedule A. of the said act.

The defendants demurred to the replication, assigning the following causes of demurrer: that the said replication contains no answer in law to the said plea, and that it seeks to make the effect of the said statute in the plea mentioned contingent on the agreement in the schedule thereto going into effect, and sets up in effect that the said statute was obtained by fraud of the defendants, or defeated by fraud of the defendants: also sets up that the defendants and plaintiffs having voluntarily abandoned the proposals and agreements mentioned in the second plea and replication thereto, made the said statute of no effect.

The plaintiffs joined in demurrer, and excepted to the plea, on the following grounds:

1st. That the said plea contains no answer to the said declaration.

2nd. That it seeks to make the effect of the said statute contingent upon certain proposals and arrangements therein mentioned, between the plaintiffs and certain other municipalities, being approved of by the rate-payers as therein mentioned, and sets up that the said statute was obtained at the instance of the plaintiffs.

3rd. That the said statute in no way affects, nor is intended to affect, the plaintiffs' right to sue in this cause, and all acts done under the statute can only affect the rights of the

parties in the manner and to the extent expressly directed in the statute, and not by inference or implication.

4th. That the said plea seeks to make the surrender of shares by certain of the share-holders under the statute an answer to the plaintiffs' claim on the bond.

Connor, Q.C., for the demurrer, cited 10 & 11 Vic., ch. 117; 16 Vic., ch. 239; 19 Vic., ch. 74.

Anderson, contra.

ROBINSON, C. J., delivered the judgment of the court.

We see nothing in the plea that can constitute a defence against the alleged breach of the plain conditions in the defendants' bond. It is not stated that any change was made under the act of parliament referred to before the conditions of the bond had been broken. On the contrary, it is in the plea alleged that the statute was passed after the alleged breaches. It is not averred, either, that any of the proposals or arrangements recited in the statute were made or entered into by the plaintiffs before the breach of the condition, and unless they were, they could not have led to the alleged breach, nor can they be allowed in any manner to have sanctioned or accounted for it, nor to have compromised the security taken by the plaintiffs from the company, so that it could not be treated as in full force at the time of the alleged breach. Then this being so, is there any thing in the statute 19 Vic., ch. 74, which we can hold has had the effect taken in conjunction with any thing which the plea alleges to have been done under it, of releasing the defendants from liability on account of a breach of so just and reasonable a condition as was contained in the bond sued upon.

We cannot say that the statute seems to us to be altogether intelligible, except by persons who may be conversant with the history of the transaction, and may know more than the statute explains. The defendants, we suppose, rely chiefly on the sixth clause of the statute, taken in connexion with the document set forth in the schedule A., as having the effect, legally or equitably, of absolving the company from the consequence of any previous breach of the bond now sued upon.

We do not perceive that they have that effect from any

thing that is expressed in them, or that can be justly gathered from them. If the sixth clause were not part of an act of parliament, it might be fairly spoken of as a striking illustration of the maxim "*dolus versatur in generalibus.*" It is not at all explained in it what illegalities or irregularities it was intended to cure, but the language is left to have as extensive application by way of indemnity as can be given to it with any degree of reason. We must then ask ourselves, whether we can imagine that it was intended by the legislature, under the words of this clause, to absolve not the *directors* merely, but the company, as a corporation, from all damages on account of so just and fair a condition made by the plaintiffs before they lent their money, as that the £50,000, which they were lending to advance the work, should not be expended till the company had obtained sufficient funds for completing the work.

If it be true that, before they obtained the necessary funds for carrying the work to completion, they expended the £50,000 in disregard of their bond, and that the plaintiffs have in consequence lost the amount, in this sense, that they have no security except a promise of a mortgage upon a road not made; if this be true, which is what the plaintiffs' case discloses, then we cannot suppose that the legislature could intend to relieve the company from the effect of this breach of their engagement, unless we see such an intention so plainly expressed that we cannot doubt it, or unless we can see that by what the plaintiffs themselves have done, they must be supposed to have intended to abandon any claim to damages for what they are now complaining of. Now as to the sixth clause, it speaks of doubts "*as to the regularity or legality of the proceedings of the directors of the said company in their dealings with the said municipalities, and obtaining loans therefrom.*" Whatever may be alluded to here, we do not think we can hold that so undoubted an illegality as that complained of—the direct violation of a plain condition in a bond, and that by the company—can be considered to have been alluded to as being among those doubtful dealings of the directors with the municipalities, and obtaining loans from them which are spoken

of in that clause. The spending the £50,000 by the company contrary to their solemn engagement, (if they did so), was no "dealing of the directors *with the municipality*," nor an obtaining a loan; it was a spending of the loan after they had received it, contrary to their engagement with the municipality. Hence the clause does not in terms relieve the company from any liability; it only indemnifies the *directors*.

But it is true that it does in words legalise the acts and proceedings of the directors *in the premises*, by act of parliament. Ought we to suppose it possible that the legislature, when they passed this act, had a knowledge that the company had acted in violation of their bond to the municipality, and meant to legalise it, and leave the municipality to bear the loss of the £50,000? We do not come to that conclusion. The clause does provide that if the ratepayers of the municipality shall ratify the proposals of the 10th of March, 1856, set out in schedule A., such ratification shall operate as a full discharge and indemnity to the directors from all claims, actions and proceedings at law or in equity on the part of the municipality, or any other party or parties whatsoever, for or by reason of the said action and proceedings *in the premises*. If we should take this to mean not merely that *the directors* shall stand discharged from any personal liability which they may have incurred in law or equity, by irregular or illegal proceedings, but that the company shall be discharged from all actions, still the release is only from claims upon them "by reason of their proceedings *in the premises*:" in other words, by irregular or illegal proceedings of the directors in dealings with the municipality, and obtaining loans from them, which we think can by no admissible stretch of construction be held to take in the case of the company illegally spending what they had borrowed from this municipality.

Then if we look at the agreement of the 10th of March, 1856, we see nothing in it from which we can infer that the municipality were aware that their loan had been expended in violation of the bond, and was not still in hand, as it ought to have been.

That is a kind of arrangement, too, not under seal: it has

no direct bearing upon the subject of this action, and we do not derive from it the impression that the plaintiffs knew then of the cause of action which they now complain of, and intended to compromise it. We do not besides see in that document anything inconsistent with the plaintiffs' pursuing their remedy upon their bond for a past breach ; and this is independent of what is said in the replication of the proposed arrangement never having been carried out, or observed.

If the legislature did mean that the statute should have the effect imputed to it, the intention should have been expressed.

In our opinion the plea is not such as we can admit, in any view of it, to be a defence to this action.

Judgment for plaintiffs on demurrer.

MCDONELL ET AL. V. THOMPSON.

Covenant against incumbrances on sale of vessel—Action thereon—Effect of notice to vendee of the incumbrance complained of—Equitable defence—Payment of purchase money.

Action on a covenant in a deed of defendant's, made on the 27th of February, 1857, by which he sold to the plaintiffs the steamer "Kaloolah," with all his rights thereunto at law and in equity, and in which deed he covenanted with the plaintiffs that he had at that time full power, and lawful and absolute authority to sell the said steamer, with her appurtenances, free from all former and other bargains, sales, rights, grants, mortgages, titles, debts, judgments, charges and incumbrances whatsoever. The declaration charged, as a breach of the covenant, "that the steamer was not at the time of making the said deed free from incumbrances, as the said Thompson had covenanted with the plaintiffs, but, on the contrary thereof, there were incumbrances at the time aforesaid on the said vessel to a large amount, to wit, the amount of £4,000, and the plaintiffs by means of the said incumbrances, were put to great loss and damage in their title, &c.; and afterwards, by reason thereof,

namely, on the 15th of May, were much prejudiced in the sale of said vessel.

The defendant pleaded, as an equitable defence, that at the time of making the deed the plaintiffs had full notice and were well aware of the incumbrances in the declaration mentioned, and knew that it existed, and purchased the steamer and took the deed subject thereto, and with the express understanding, and upon the agreement, that out of the purchase money the defendant should pay off the incumbrance, which the defendant averred he would have done, but that the plaintiffs did not pay and had not yet paid to him the whole of such purchase money, as they ought to have done.

The plaintiffs took issue upon this plea, and also demurrer to it.

At the trial, at Toronto, before *Draper*, C. J., it appeared to the learned Chief Justice that the defendant had wholly failed in proving his plea: that notice of the incumbrance to some of the plaintiffs before they purchased had indeed been shewn, which he held to be equivalent to notice to all of them, but that he saw no evidence to support the residue of the plea: namely, the alleged understanding that out of the purchase money to be paid by the plaintiffs the defendant was to pay off the incumbrance, and that the plaintiffs had not yet paid him.

The defendant's counsel contended that the legal effect of the notice established the rest of the plea, but on hearing the direction proposed to be given to the jury, he said he withdrew his defence, and asked leave to take the plea off the record.

The Chief Justice declined giving that permission, but told the jury that the defendant made no defence, and that the full amount of the mortgage should be recovered in damages.

The mortgage was given on the 3rd of May, 1853, to one Patchin, for £2,000, for part of the price of the boat on defendant's purchase of her. A balance was due on the mortgage of £1,333 6s. 8d., bearing interest from the 3rd of May, 1853, and for that amount the verdict was given, £1693 6s. 8d.

It appeared from the evidence that the plaintiffs bid for the

boat what they considered her value, or rather what they were willing to give as her full value, being aware that a balance was yet due on her to Patchin, her former owner, by their vendor, Thompson, and was secured by mortgage on the boat.

Eccles, Q. C., obtained a rule *nisi* for a new trial for misdirection, to which *Connor*, Q. C., shewed cause, citing Rawle on Covenants for Title, 154, note 1.; Mayne on Damages, 101; *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Ogilvie v. Foljambe*, 3 Mer. 53.

Eccles, Q. C., contra, cited Sug. V. & P. 10th Ed. II. 449; Rawle on Covenants for Title, 155.

ROBINSON, C. J., delivered the judgment of the court.

The usual course, under the circumstances of this case, would have been for the plaintiffs to retain so much of the price in hand as was necessary for paying off the incumbrance, instead of letting it go into the defendant's hands, but we infer from the evidence that it was otherwise agreed, and that both parties found an advantage in deviating from the ordinary course. It would seem that the defendant accepted payments from the plaintiffs otherwise than in money, and which Patchin probably could not be expected to take as money, and it was agreed, in consequence, that Thompson should covenant against incumbrances, and was therefore to take care and discharge the incumbrance. The covenant binds him to do that in effect, without any such qualification as that the plaintiffs were to furnish the means.

The only question at the trial was whether the equitable plea was true in substance, and it was certainly not proved.

Admitting it to be the case, that where the person taking a covenant that an estate or other property is free from incumbrance knows of a particular incumbrance to which at the time it is subject, a court of equity will restrain him from suing at law upon the covenant, that must of course be because it would be inferred, unless the contrary were shewn to be the fact, that allowance for the incumbrance had been made in the price given for the land, in which case it would be obviously unjust that the vendee should be allowed to

recover damages on account of the incumbrance. But the inference which would naturally arise, as we have stated, might be shewn not to be a just one under the circumstances of a particular case, on account of some arrangement made by the parties, and the mere fact of the vendee having notice of the incumbrance when he took the covenant would cease to be an equitable defence. For instance, in this case, there seems to be no doubt that the plaintiffs knew that Patchin had not been paid, and that he held a mortgage upon the boat, but it might have been an object for the parties to this suit to arrange the payment between them of the whole price to be given for the boat in such a way, by land, or stocks, or a turn of some kind, as would leave nothing in hand to pay off the incumbrance. In such a case the defendant receiving the full price of his boat, without abatement on account of the incumbrance, must be supposed to have set the other party at ease as regarded the incumbrance, by engaging to take that with all its consequences upon himself. He might say, "I have made provision for that, and will give you an assignment, covenanting in the usual way against incumbrances, and it will rest with me then to pay off the mortgage."

If a court of equity should see, in any such case, that these were the circumstances, they would hardly feel it equitable to interfere with the action at law, because they only interfere for the purpose of compelling people to act justly, and to prevent legal remedies from being pursued contrary to good conscience.

Now in this case the defendant proved this much of his plea on the trial. He shewed that the plaintiffs knew of the mortgage in question when they took the covenant; but by what did appear at the trial the inference was repelled, that they withheld part of the purchase money to pay it, or that there was any abatement in the price. The defendant seems to have attempted to bring the matter to the same conclusion, in effect, by alleging and attempting to prove that, although he was to get the whole price into his own hands, yet the understanding was that it was out of the price to be paid by the plaintiffs to him that he was to discharge the incumbrance,

and that it was only, because the plaintiffs had not paid the price that the mortgage remained undischarged. In this part of his case the defendant seems to have failed altogether, for he did not prove that the understanding was that he was to pay out of the money he was to receive, and the evidence seemed to make it clear that he had been satisfied for the purchase money through the arrangements to which he had assented. Besides this, the defendant expressly gave up his plea at the trial, and desired to take it off the record. The verdict seems to be right in regard to amount, and was in accordance with the opinion of the learned judge at the trial.

Rule discharged.

The following gentlemen were called to the bar during this term: NEIL McLEAN TREW, GILBERT TICE BASTEDO, JAMES AGNEW, ROBERT MACFARLANE, JAMES MACLENNAN, FARQUHAR MACGILLIVRAY, DANIEL MACAROW, ALEXANDER SUTTON KIRKPATRICK, ALFRED DRISCOLL, EDWARD WILLIAM JAMES TINNEY.

HILARY TERM, 21 VICTORIA.

Present :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD MCLEAN, J.

“ ROBERT EASTON BURNS, J.

RULES UNDER THE CRIMINAL APPEAL ACT.

Rules made by the Judges of the Superior Courts of Common Law in Upper Canada, under the Statute passed in the twentieth year of Her Majesty's reign, and in the year of our Lord 1857, intituled "An Act to extend the right of appeal in criminal cases in Upper Canada."

IN THE QUEEN'S BENCH AND COMMON PLEAS, HILARY TERM, 21st VICTORIA,

IT IS ORDERED,

1stly—That in all cases of appeal from the judgment of the Court of Quarter Sessions, under the said statute, notice of such appeal shall be given by the person convicted, or his attorney, to the county attorney for the county in which the conviction shall have taken place within six days from the time of sentence being passed; or, in case there shall be no county attorney for such county, then to the clerk of the peace thereof; and an affidavit of service of such notice shall be filed in the superior court appealed to, with the papers directed by the said statute to be transmitted from the Court of Quarter Sessions.

2ndly—That a copy of the indictment and of any subsequent pleadings, and of the verdict indorsed upon the indictment, shall be sent with the proceedings directed by the said statute to be transmitted; and that where the new trial has been moved for upon the ground that the evidence did not warrant the conviction, a full statement of the evidence shall be sent with the case, signed and certified in the same manner.

3rdly—That every case sent from the Quarter Sessions shall state whether judgment on the conviction was passed, or postponed, or the execution of the judgment respited; and whether the person convicted is in prison, or has been discharged on recognizance of bail to appear and receive judgment.

4thly—That in every such case of appeal from a Court of Quarter Sessions, the original case signed by the recorder or chairman of the court, and four copies of such case, one for each judge, and one for the county attorney or other counsel for the crown, shall be delivered to the clerk of the court appealed to, at least four days before the sitting of the said court: provided, that where the new trial has been moved upon the evidence only, one copy of the report of the evidence in full need be filed, in addition to the statement of the evidence which has been certified; and that when any case is intended to be argued by counsel or by the parties, notice thereof be given to the clerk of the court appealed to, at least two days before the day appointed for argument, which shall be one of the paper days during the term.

5thly—That upon any application for a new trial to either of the superior courts of common law, by or on behalf of any person convicted before a Court of Oyer and Terminer and Gaol Delivery, a copy of the indictment and subsequent pleadings, if any, and of the verdict indorsed upon the indictment, and a copy of any written instrument or writing on which the indictment is founded, the whole to be certified by the clerk of assize or other officer having custody of the same, shall be filed in the court with the motion paper for a new trial.

6thly—That in every such case as is mentioned in the last preceding rule, where the person convicted has been defended by counsel at the trial, a detailed statement of the evidence, approved by the judge who tried the case, shall be furnished to the court of appeal by the defendant, at the same time with the copy of the indictment.

7thly—That upon any application for a new trial to either of the superior courts of common law, by or on behalf of any person convicted before any Court of Oyer and Terminer, or Gaol Delivery, if such court shall grant a rule to shew cause against the application, such rule may be made upon the Attorney-General, and it must contain a distinct statement of the grounds upon which the new trial has been moved, or such of them as shall have been entertained by the court, and the rule may be made returnable according to the general practice of the court, unless it shall be otherwise ordered, and shall be served upon the Attorney-General at least two days before the same is returnable.

8thly—That if in any criminal case, in which a question or questions shall have been reserved for the opinion of either of the superior courts of common law, under the statute passed in the fifteenth year of Her Majesty's reign,

intituled "An Act for the further amendment of the administration of the criminal law," the person or persons convicted shall move for a new trial, then, in case the court shall grant a rule to shew cause, all further proceedings upon the case reserved, and stated by the judge who presided at the trial, shall thenceforth cease.

9thly—That in all cases of appeal to the court of Error and Appeal, under the said act passed in the twentieth year of Her Majesty's reign, it shall be written on the back of the copy of the indictment filed in the court where judgment is appealed from, that the conviction of the defendant has been affirmed, which minute shall be signed by the Chief Justice, or in his absence by the senior puisne judge of such court; and the allowance of the appeal when, granted under the fourth clause of the said act, shall be written immediately thereunder, or elsewhere upon the back of the said copy of indictment; and the said copy of indictment and other pleadings, with such minute indorsed thereon, shall be delivered into the Court of Appeal in open court by the Chief Justice, or in his absence by the senior puisne judge of the court whose judgment has been appealed from, together with such copy or report of the evidence given upon the trial as was in possession of such court.

10thly—And that whenever an appeal to the Court of Error and Appeal shall be allowed in any criminal case under the statute, a minute of such allowance shall be forthwith sent by the Chief Justice of the court, or by one of the judges thereof, who shall have signed such allowance, to the judge who presided at the trial, or, in case of his death or absence, to the Governor-General of the province, in order that the execution of the sentence may be respited, when that shall be proper to be done in consequence of such appeal.

(Signed)

JOHN BEVERLEY ROBINSON, C. J.
WILLIAM HENRY DRAPER, C. J. C. P.
ARCHIBALD McLEAN, J.
ROBERT EASTON BURNS, J.
WILLIAM BUELL RICHARDS, J.
JOHN HAWKINS HAGARTY, J.

Toronto, 13th February, 1858.

THE INGERSOLL AND THAMESFORD GRAVEL ROAD COMPANY
V. MCCARTHY.

Action for calls—Stock taken by agent—Proof of authority.

The defendant had taken shares in a road company, for which he had subscribed his name; and more stock being required, the secretary called to solicit a further subscription. Defendant told him he would take another £100, and the secretary afterwards, in defendant's absence, put down his name for these shares.

Held, not sufficient to charge defendant.

The authority to take shares for another in such companies should be in writing, but *semble*, that a verbal authority would be binding.

The declaration charged defendant with being a holder of twenty shares of the stock of the company, and that he was indebted to the company in £100, for ten calls, of ten per cent. each, on each of the twenty shares.

Pleas.—1. That defendant was not the holder of the said shares. 2nd. That he was not indebted as alleged.

At the trial, before *Burns, J.*, at Woodstock, the facts appeared as follows. The company had been in operation for some years, and had completed a certain portion of road, and the defendant had been the holder of twenty shares of the stock, £100, which had been all paid up, and he had sold out these shares, and was not then a member of the company. In May, 1856, there was a desire to extend the road, and for this purpose new shares or stock were required to be taken. The question at the trial was, whether the defendant in truth was the shareholder of twenty new shares of £5 each, or not, and whether sufficient proof of the calls was given.

It appeared that for the first twenty shares the defendant had subscribed his name himself in the share-book, but for these last twenty shares he had not; but the plaintiffs relied on the following evidence to establish that defendant was a shareholder. The secretary of the company proved that in May, 1856—he could not state the day, further than that it was in the beginning of the month—he called on the defendant at his house, and found him in his yard doing some work, and he represented to him that other parties had taken new shares, and asked the defendant to take £100 stock. He stated that defendant at first declined to take any stock, or have anything to do with the road, but after

talking the matter over some time, the defendant said to him that he should not mind taking another £100 in stock if he were made superintendent of the work, and that he did not say he would take the stock on condition that he was appointed superintendent. The witness further stated that he called one Duffy, who was attending to the defendant's horses, to witness that defendant, in reply to his question whether he would take the stock, said yes he would. After that the secretary, instead of asking the defendant to walk into his house, and write his name down, went himself into the shop of a person not far away, and, in the defendant's absence, wrote the defendant's name in the stock-book for the twenty shares. Other witnesses were called, who proved that on subsequent occasions the defendant stated that he had taken the new stock, and that he had done so rather than that the road should not be finished. The superintendency of the road was offered to the defendant in June, 1856, but he refused to take it.

On the part of defendant, the man Duffy was called, who swore that when the secretary called on the defendant to take the new stock, what the defendant said was, that if he were made superintendent of the road he would not mind taking another £100, but that he distinctly refused to put his name down, or have anything to do with the list: that the secretary called him to witness what the defendant said, that he would not mind taking another £100 if he were made superintendent; and the answer of the secretary to that was, "if the road does not go on to your satisfaction you will not be called on to pay."

Notice of the calls was given on the 19th of June, 1856, in the newspaper called "The Ingersoll Chronicle," the first call of ten per cent. to be made on the 24th of July, and ten per cent. every month thereafter till all paid up. One newspaper only was produced containing the advertisement, but the witness stated that it had appeared for four or five weeks.

The defendant's counsel objected, that the production of one newspaper was not sufficient proof of the calls: that the other weekly papers should have been produced to the court. He referred to the 15th and 17th sections of 16 Vic., ch. 190.

On this point the learned judge reserved leave to the defendant to move the court to enter a nonsuit. As to whether defendant was a shareholder, he left to the jury to say whether the defendant had in fact authorized the secretary of the company to subscribe his name to the stock-book for those additional shares; and he remarked that in his opinion he should think the evidence rather insufficient, considering that the defendant had in the first instance subscribed his own name to the book; and when the secretary called upon him to take the additional shares it was just as easy for the defendant to have gone into his house and written down his name himself, as to have sent the secretary away to another place, with instructions to put it down for him.

The jury found for the plaintiffs, for the amount of the calls, £100.

Anderson obtained a rule, calling on the plaintiffs to shew cause why the verdict should not be set aside, and a new trial granted, on the following grounds: *first*, that the verdict was contrary to law and evidence, and the judge's charge; *secondly*, on the exceptions to the evidence taken at the trial; *thirdly*, on the ground of surprise, and discovery of fresh evidence since the trial.

The affidavits in support of the rule were that of the defendant, who denied in positive terms that he ever authorised the secretary of the company to put his name to the share list; and of another person, who stated that the secretary informed him that he had used the defendant's name in order to induce others to subscribe for shares.

Crombie shewed cause, and filed affidavits of other shareholders of the company, stating the same thing that was proved at the trial, namely, that the defendant had admitted himself to be a shareholder for the new shares.

Anderson supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

We do not perceive in the learned judge's report of the evidence any proof whatever of authority given by the defendant to the secretary of the company to subscribe in his

name for stock in the road company. The utmost extent the evidence goes to, is that the defendant gave him to understand that *he would take* £100 of the new stock proposed to be raised by subscription, but no direct authority to the secretary to write his name down; and the evidence, even as far as it went, was contradicted by the very person whom the secretary called to witness what the defendant said.

The general principle as to the manner in which an agent may be constituted undoubtedly is, that where the act in the principal's name is required to be done under seal, then he cannot give to another power so to bind, unless by an instrument under his seal. Now there is nothing that requires the subscribers in these joint-stock companies to attach a seal to their subscriptions. Therefore we should have no authority for holding, that if they desired to subscribe through an attorney or agent they must give him his authority by a sealed instrument; and if that be not necessary, we do not find a distinction drawn in any such case, nor, indeed, we believe we may almost say in any case between an authority in writing not under seal, where that will suffice, and a verbal authority merely. We all know, too, that for many purposes of business, especially of a commercial nature, an agency is recognised as being sufficiently constituted by writing merely, without a seal, and in most, if not all of the same class of cases, by verbal delegation of authority merely, without writing, and also by proof of acts and conduct of the principal, from which the power to represent him in the particular matter may be inferred. In the work of Mr. Story on Agency, 5th Ed., sections 45 to 57, the law on this point is stated much at length, but we do not find there, nor have we been able to find elsewhere, the question discussed, in what manner an authority may be conferred by one man upon another, to bind him by taking stock in his name in an incorporated company.

It seems so indispensable to the security of the person whose name may be subscribed by another for such a purpose, and so material to the interests of all with whom he would become associated through the subscription, that the authority to put his name down in his absence should not

be left to be gathered from the verbal statement of others ; and one foresees so much inconvenience in receiving subscriptions in that informal manner, that we strongly incline to think it should not be held binding in law ; and yet we do not see in the statute itself anything that clearly leads to this conclusion, nor have we found anything elsewhere.

On this, however, we are quite confident, that upon the evidence that was given at the trial, if all that the plaintiffs' witnesses proved were credited, it shewed no verbal or other authority given to any one to subscribe the name of the defendant to the stock-list. It went no further than to shew that the defendant had expressed himself willing to take stock, or seemed to have made up his mind to do so, which ought to have been followed by his actually subscribing before he can be held to have taken the stock, for A. telling B. that he means to take stock, or will take it, or has taken it, and to a certain amount, does not authorise B. to write his name down as a subscriber. The two things are perfectly distinct ; and besides, the evidence even of an assent to take stock was so unsatisfactorily made out that we think the verdict ought not to stand, but that there should be a new trial without costs, for the jury were told that the evidence was not satisfactory to bind the defendants.

Rule absolute.

IN RE HARRISON AND THE TOWN COUNCIL OF THE TOWN OF OWEN SOUND.

Tavern licenses—What duty may be imposed without reference to electors—Imperial duty—Fees of officers—16 Vic., ch. 184, sec. 4.

A by-law requiring the payment of £10 for an inn license, over and above the imperial duty of £2 5s. currency, need not be approved of by the electors under 16 Vic., ch. 184, sec. 4, for that clause applies only to by-laws imposing a fee of more than £10 *exclusive of the Imperial duty*. Fees directed to be paid to the treasurer and inspector, are not to be considered as part of the duty on the license.

Eccles, Q. C., obtained a rule *nisi* to quash by-laws 4 and 5 of this municipality, on the ground that neither of them was at any time submitted to, or approved of, or adopted by the electors of the municipality, as required by law.

By-law No. 4 was passed on the 17th of February, 1857.

It was entitled a "By-law to license and regulate inns in the town of Owen Sound." It contained a number of provisions respecting the licensing and regulation of inns, and fixed the duty to be paid for a license to keep an inn. The 9th clause provided "that every person to whom an inn license shall be granted shall pay the sum of ten pounds, over and above the imperial duty of £2 5s. currency, and the fee of 5s. to the treasurer for issuing the license, as well as the fees to the inspector of taverns."

The by-law No. 5 was passed on the 19th of February, 1857, for regulating the duties of tavern inspectors. In the fourth clause it provided that the inspector should be entitled to receive *ten shillings for the first inspection from every person applying for a license*, and 2s. 6d. each for every subsequent inspection during the year, not exceeding three, and should also be entitled to 3s. 9d. for every certificate granted to a party, to enable him to obtain his license.

The applicant swore that neither of these by-laws was, before the final passing thereof, adopted or approved of by a majority of qualified municipal electors.

It was contended that they required to be so approved of, according to the fourth clause of the 16th Vic., ch. 184, because they imposed upon the person who was to receive a license a greater sum than £10 per annum; that is to say, that sum in addition to the imperial duty, and the fees established by those by-laws.

Adam Wilson, Q. C., shewed cause.

ROBINSON, C. J.—I inclined at first to think that the by law does require the payment of a greater sum than £10 per annum for the license, when it provides that the inn-keeper shall pay £10 per annum over and above the imperial duty of £2 5s. currency, and so would be void; yet it cannot be said that the municipal council by their by-law requires more than the £10 to be paid, though they do make a greater sum than £10 payable in effect. Suppose, however, that the imperial duty was in itself over £10, then, under the words used in the statute, the municipal council could not have imposed any duty without the consent of the electors, according

to the construction which I first intimated. My brothers believe, I think, as I do, that the latter construction is the more correct one, and that as the by-law does not impose a higher duty than £10, it is not one that required to be submitted to the electors; and we do not think the second by-law, which merely gives small fees for services to be rendered by the treasurer and inspectors, required to be submitted to the electors, because the fees are payments for services rendered, and are not a duty charged for the license.

BURNS, J.—I do not think the objections made to these by-laws are entitled to prevail. The limit of £10 to which the town council may go, imposing a duty upon tavern licenses, without submitting the by-laws to the municipal electors, appears to me to be a gross sum of that amount without taking into account the duty of the imperial act. The expression in the 4th section of 16 Vic., ch. 184, is "provided always that no by-law made under the authority of this act," &c., and the by-law in question is made under that authority, and extends to no larger sum than £10, though it does say that the sum of £10 shall be paid in addition to the £2 5s. imposed under the imperial act. It is quite clear that the legislature kept in mind the payment of the duty under the imperial act, for the fifth section of the act declares that the duty so imposed shall be payable on the license to be granted by virtue of 13 & 14 Vic., ch. 65, and I see no other mode of reading those sections than that the imperial duty shall be paid on the license, in addition to any sum, not exceeding £10, which the municipal council may declare by a by-law to be the duty, or beyond £10 if the by-law be sanctioned by the majority of the electors of the municipality. If the imperial duty is to be considered as part of the £10, then the minor limit must exist as well as the larger, for the municipal council has no authority to dispense with the payment of that sum, and to adopt that view is to put a construction on the words *a greater sum than £10*, which the words themselves do not imply, for if that be the limit on the one hand, nought must be the limit on the other. This proves that the words are to be read *per se.*, and not in connection

with other words, either to enlarge or circumscribe the natural effect of them.

The objection to by-law No. 5, is that the fees therein prescribed to be paid to the inspector, when taken in connexion with the sum provided for to be paid by the other by-law, make a sum exceeding £10, which the applicant for license is made to pay. The 13 & 14 Vic., ch. 65, gives authority to the municipal council to prescribe the duties of inspectors, and to provide for their remuneration. I see nothing interfering with the right of the council to exact the payment of £10 to the corporation funds, in the fact that the council has obliged the applicant for the license to remunerate the officers whom the legislature has declared shall be elected. The fourth section of 16 Vic., ch. 184, expressly says that all sums levied under by-laws made under that act shall form part of the general funds of the municipality, but that £10 is the limit to which the council has authority to tax licenses without submitting the by-law for the purpose to the electors. This leaves untouched what the council may enact with regard to the duties of inspectors, and their remuneration, under the 13 & 14 Vic., ch. 65.

For these reasons I think the rule must be discharged.

McLEAN, J., concurred.

Rule discharged.

EVANS V. ROBINSON.

Guarantee—Statement of Consideration—Pleading.

Defendant gave plaintiff the following guarantees:—

“I hereby become responsible to you for the payment of £120 17s. 6d. on the first day of April next, in case John Cooper fails in paying you that sum.”

In declaring on this the plaintiff alleged that J. C. was indebted to him in the sum named at the date of the guarantee, and that, in consideration of his giving time till the 1st of April, defendant promised to pay then, &c. Defendant pleaded non-assumpsit.

Held, that the plaintiff must be nonsuited, for the consideration stated was not supported by the instrument produced, and the plea put in issue the consideration as well as the promise.

The declaration in this case stated that one John Cooper was indebted to the plaintiff in the sum of £120 17s. 6d. on the 28th of February, 1857, and the defendant, in consideration that the plaintiff would forbear and give time to Cooper until

the 1st of April for the payment of the said sum did, on the 28th of February, promise to pay him the said sum on the 1st of April, in case Cooper should fail in paying the same; and the plaintiff did forbear and give time to Cooper for payment until the 1st of April, and Cooper failed in paying the said sum; and although the defendant did pay the plaintiff £20 17s. 6d., part of the said sum, yet the defendant had not paid the residue.

Plea.—*Non-assumpsit*.

At the trial, before *Burns*, J., at Toronto, it appeared that the instrument upon which the plaintiff brought this action was as follows:

“Toronto, 28th February, 1857.

MR. GEORGE EVANS,—

I hereby become responsible to you for the payment of £120 17s. 6d. on the first day of April next, in case John Cooper fails in paying you that sum.”

A verdict was entered for the plaintiff for £105, the balance due and interest, and leave was reserved to the defendant to move to enter a nonsuit, if the plaintiff upon the pleadings and the instrument produced was not entitled to recover.

Cameron, Q.C., obtained a rule *nisi* accordingly.

C. S. Patterson shewed cause, and contended that by the terms of the instrument the consideration on which it was given sufficiently appeared: that the promise on the 28th of February, to pay on the 1st of April, shewed a debt due on the 28th of February, and a forbearance till the 1st of April, which was a sufficient consideration for the defendant's promise; but that by the plea of *non-assumpsit* the consideration as stated in the declaration was not put in issue, and the promise to pay was the only matter in issue between the parties: that a guarantee need not shew *when* the debt guaranteed was due, but that parol evidence might be given to establish that point. He cited *Morris v. Stacey*, 1 Holt 153; *Boehm v. Campbell*, 8 Taunt. 679; *Pace v. Marsh*, 1 Bing. 216; *Emmott v. Kearns*, 5 Bing. N. C. 559, *Coe v. Duffield*, 7 Moore 252; *Shaw v. Caughell*, 10 U. C. R. 117; *Moberly v. Baines*, 15 U. C. R. 25.

Cameron, Q. C., contra, contended that though a debt was due to the plaintiff by Cooper, for whom the guarantee seemed to have been given, yet that the *time* at which such debt was payable did not appear, and could not be assumed to be before the 1st of April, and that no forbearance could be inferred from the instrument declared on to support the consideration stated in the declaration. He cited *James v. Williams*, 5 B. & Ad. 1109; *Cole v. Dyer*, 1 Cr. & J. 461; *Law Magazine*, Vol. xxv., page 65.

McLEAN, J.—It is clear the plaintiff's attorney considered that on such an instrument the plaintiff could not recover without alleging in his declaration some good consideration for the promise, and he therefore alleges that John Cooper was indebted to the plaintiff on the 28th of February, 1857, in the sum of £120 17s 6d., and that defendant, in consideration that the plaintiff would forbear and give time to Cooper till the 1st day of April then next for the payment thereof, undertook and promised the plaintiff to pay him the same on the first day of April, if John Cooper should fail in paying the same. He then alleges that the plaintiff did forbear and give time to Cooper: that he failed to pay the amount, and that though defendant has paid a part of the amount he has not paid the whole. Having averred forbearance it was necessary to prove it, if put in issue by the plea of non-assumpsit. The instrument on being produced certainly does not shew that Cooper owed the plaintiff any debt which was payable before the 1st of April, nor in fact that the amount to be paid was at all a debt of Cooper's. The defendant undertook to pay if Cooper failed to do so on a particular day, but for aught that appears on the instrument the consideration may have been for something else than a debt due by Cooper. The inference may be that a debt was due to the plaintiff by Cooper, but not that it was payable at the date of the guarantee, nor that there was any forbearance or time given for the payment, as stated in the declaration. By the case of *Wain et al. v. Warlters* (5 East 10) it was decided that the agreement or instrument on which an action is brought must be in writing, under the fourth section of

the Statute of Frauds (29 Car. II., ch. 3), and that the agreement or instrument must shew the consideration for the promise as well as the promise itself; and it was expressly held in that case that parol evidence of the consideration was inadmissible, and that the consideration not appearing on the face of the instrument, such an instrument or undertaking for the debt of another was *nudaum pactum*, and gave no cause of action. The grounds of decision in that case are very ably discussed in a note to the case of *Morris v. Stacey* (Holt.N.P.C. 153), but I do not find that it has been over-ruled: on the contrary, in all the cases on guarantees the question has been whether a sufficient consideration was shewn by the instrument. That was the question in the cases cited by the plaintiff's counsel on the argument, and the decisions turned solely on that ground.

The cases of *Coyle v. Dyer* (1 Cr. & J. 461) and *Raikes et al. v. Todd* (8 A. & E. 846) recognise and confirm the decision in the case of *Wain v. Warlters*, and considering the law as settled by these cases, I think that the instrument signed by defendant does not support the plaintiff's declaration, and that the action cannot be sustained.

I think the plea of non-assumpsit put in issue the consideration as well as the promise. The defendant says he did not promise as alleged. Now what is alleged? The allegation is that in consideration of plaintiff's forbearance defendant promised to pay. To this defendant says that he did not so promise: that is, that he did not promise for the consideration specified; thus putting in issue both the consideration and the promise. I think, therefore, the rule should be made absolute to enter a nonsuit.

BURNS, J.—There can be no question that the instrument produced makes the case come within the decisions of *Wain v. Warlters* (5 East 10); *Saunders v. Wakefield* (4 B. & Al. 595); and *James v. Williams* (5 B. & Ad. 1109). The cases cited by the plaintiff's counsel are all cases where an inference might be drawn from the instrument itself of what the consideration was for the promise. The consideration stated in the declaration is that of a debt due by Cooper to

the plaintiff, and time given for the payment of it. I do not mean to say but that perhaps it might be fairly enough inferred from the instrument that Cooper was indebted to the plaintiff: but when that debt would be due—whether due at the time the paper was dated, or whether due on the 1st of April, or at any other time—no one can possibly tell on reading the document; and, therefore, whether the consideration for the promise was that of giving time for the payment of the debt it is quite impossible to say. Upon the instrument, therefore, we can do no otherwise than say, in accordance with many similar cases, that the consideration for the promise does not appear, nor can reasonably be inferred from the language of the instrument. The plaintiff's counsel, feeling this difficulty, has argued the case very ingeniously upon the footing that, although the consideration does not appear upon the face of the instrument, yet that, because the defendant has pleaded *non-assumpsit* merely, it must be taken that the consideration as stated in the declaration stands confessed, and therefore the plaintiff will be helped out of the difficulty. That, however, is not so. The plea of *non-assumpsit*, wherever the action is upon a special promise, has the effect of traversing the consideration as well as the promise. See *Beech v. White* (12 A. & E. 668 and cited in 3 Q. B. 607.) The case of *Raikes v. Todd* (8 A. & E. 854) was an action upon a guarantee somewhat similar to the present, where the defendant pleaded *non-assumpsit*, and Lord *Denman* said, "If you disprove the consideration laid, you of course disprove the contract." The objection raised in this case by the defendant's counsel is not to the consideration as stated in the declaration, but his objection is that when the instrument is produced it does not prove such consideration, for in fact it imports no consideration at all, and consequently the declaration is not sustained by the proof; and he contends further that no other proof of the consideration can be received than what appears by the written guarantee. In this the defendant is right, and therefore the rule must be made absolute to enter a nonsuit. The plaintiff cannot help the written paper by any parol evidence.

The CHIEF JUSTICE gave no judgment.

Rule absolute.

FOWLER V. BENJAMIN.

Action for false representations—Averment of fraud—Pleading.

In an action for false representation of the credit of a firm, the statement complained of was that the partners were worth from four to five thousand pounds *between them*, out of which they owed defendant and others £1000; and the plaintiff, as a denial of this statement, alleged that they were not worth from four to five thousand pounds (not adding *between them*); and that they were not then indebted to the defendant and the other persons named in £1000, but in a much larger sum, namely, £3000.

Held, that the denial of the worth of the parties referred to was not more extensive than the statement, and that it was sufficiently alleged that they were indebted in more than £1000.

Held, also, that it was sufficient to allege that the defendant wrongfully and falsely made such statements knowing them to be false, without adding *fraudulently*, for fraud is included in the allegation.

Held, also, that in the declaration, set out below, it sufficiently appeared that the plaintiff had given credit to the firm in question.

Declaration: That the plaintiff, before the committing of the grievances by the defendant as hereinafter mentioned, applied to the defendant to be by him informed of the credit and circumstances of Isaac Lewine and Lyon Lewine, who were then doing business together at Toronto, under the style and firm of I. & L. Lewine, and who had before then applied to the plaintiff, and requested him to furnish them with goods on credit; and the defendant, in reply to the said application of the plaintiff, afterwards, and before the commencement of this suit, wrongfully and falsely informed the plaintiff that the said Isaac Lewine and Lyon Lewine were then worth from four to five thousand pounds *between them*, out of which they owed one Moss, and the defendant and his co-partners, the sum of £1000; (and also that they, the defendant and his co-partners, had sold to the said I. & L. Lewine that spring, for Toronto and Quebec, over twelve hundred pounds currency, the notes for which were being paid as they matured, and that the defendant and his co-partners had that autumn imported six hundred pounds sterling for the said I. & L. Lewine.) And the plaintiff, in consequence of this information, and believing the same to be true, did afterwards, and before the commencement of this suit, sell and deliver to the said Isaac Lewine and Lyon Lewine certain goods and merchandise, amounting in value to a large sum of money, to wit, to £600, whereas, in truth and in fact, the said Isaac Lewine and Lyon Lewine, at the

time of the defendant so giving the information to the plaintiff as aforesaid, were not worth from four to five thousand pounds, and the defendant then well knew the same, and the said Isaac Lewine and Lyon Lewine were not then indebted to the said Moss and the defendant, and his co-partners, in the said sum of £1000, exclusively of the said arrears of £1200 currency, and £600 sterling, so sold and imported as aforesaid, but in a much larger sum—that is so say, the sum of £3000—which the defendant well knew: and the plaintiff further saith, that though the time for which he gave credit to the said Isaac Lewine and Lyon Lewine for the goods sold to them as aforesaid has elapsed, yet they have not paid the plaintiff the amount due for the said goods, nor any part thereof, and still are unable to pay the same, and the amount thereof is likely to be wholly lost to the plaintiff. And the plaintiff claims one thousand pounds.

Demurrer, that the declaration is bad, because the allegation negating the statement of the defendant's representations is more extensive than the representation itself.

Cameron, Q. C., and *Adam Crooks* for the demurrer, cited *Pasley v. Freeman*, 3 T. R. 51; *Ormrod v. Huth*, 14 M. & W. 651; *Burley v. Walford*, 9 Q. B. 197; *Taylor v. Ashton*, 11 M. & W. 415; *Jarrett v. Kennedy*, 6 C. B. 319; *Corbett v. Brown*, 8 Bing. 33; *Thorn v. Bigland*, 8 Ex. 725; *Cornfoot v. Fowke*, 6 M. & W. 258; *Moens v. Heyworth*, 10 M. & W. 147; *Evans v. Collins*, 5 Q. B. 804; *Fuller v. Wilson*, 3 Q. B. 58; *Rawlings v. Bell*, 1 C. B. 951; *Haycraft v. Creasy*, 2 East 92; *Longmeid v. Holliday*, 6 Ex. 761; *Moore v. Clucas*, 7 Moo. P. C. 352; 2 Sm. Lea. Cas. 62.

Eccles, Q. C., and *Freeland* contra, cited *Parrett Navigation Co. v. Stower*, 6 M. & W. 564; *Tennery v Stiles*, 5 U. C. R. 254; 1 Saund. 207, note 5; Ch. Prec. 40, note 1.

ROBINSON, C. J., delivered the judgment of the court.

The single exception pointed out in the demurrer, is that the averment negating the truth of the defendant's representation is more extensive than the representation itself. This may or may not be an objection, according to the nature of the negative averment. In some cases the exception

would be unreasonable and idle. What is alluded to here is, that the declaration states the defendant to have represented that Isaac and Lyon Lewine were then worth from four to five thousand pounds *between them*, whereas the fact is stated to have been that they were not then worth from four to five thousand pounds, without adding the words "*between them*."

We do not take that to be a substantial variance, especially considering the circumstances which are set forth. The first statement no doubt refers to the credit or worth of the firm, but includes also, as we assume, what either of them individually would be worth, as in the case of an ordinary partnership, all the property of both and of each that would be liable to satisfy the partnership debts. But the assertion in the latter part of the statement would, we think, go the whole extent of the former, for Isaac Lewine and John Lewine together would be worth whatever they owned either as co-partners or individually, in this sense, that though they would not own jointly the separate private property of each, yet the private property of each would constitute a fund to which their creditors could look for payment; and we think we should regard the words in the latter statement as used in such a sense as to deny the truth of the former, being in fact co-extensive.

But if that part of the declaration were clearly bad, it would not affect the rest of the count, if there is in it besides a sufficient statement of an independent cause of action; and this we think there is, as regards the misrepresentation of the amount of the Messrs. Lewine's indebtedness to Moss and the defendant and his partners.

Then as to that part of the count, it seems to us the plaintiff, when he avers that the Lewines were not then indebted to Moss and the defendant and his co-partners in £100), should have added the word *only*, or something equivalent to it; but what strikes us as strange and inconsistent with this action in the statement as it stands, is clearly enough explained by the addition of the words, "*but in a much larger sum, viz,*" &c.

We see on the face of the whole statement that the plain-

tiff has not simply denied that the Lewines were indebted in £1000, but in that sum and no more. The intent is too plain to make an inaccuracy of that kind of any consequence now, and we do not think this exception would have appeared formidable on a special demurrer.

The more substantial exception is, that the declaration does not aver that the defendant made his representation fraudulently or maliciously, or with intent to deceive.

We have looked into all the cases cited by the counsel on that point, and into others, and we have no doubt that the declaration states a good cause of action.

It is averred that the defendant *wrongfully* and falsely made a statement in regard to the credit of the Lewines, and the amount in which they were indebted *to himself and his partners* and to Moss, which *he knew* at the time to be false.

To make wrongfully and knowingly a false statement of the amount of a party's indebtedness to the very person of whom the inquiry is made, is in itself a fraud. We mean, the allegation includes it so clearly as to make it unnecessary to apply the epithet.

The distinction, as we take it, is between cases in which the party may be supposed to be expressing his opinion or conviction merely, and not to be stating a fact necessarily known to himself. We refer on this point to Chitty on Pleading 7th Ed. 405.

It has been objected that the declaration does not shew that the plaintiff did after all give any credit to the Lewines.

It is not so distinctly averred certainly as it should have been, but it does sufficiently appear, we think, on the face of the whole declaration, that the plaintiff did give credit to them, for he avers that *though the credit had elapsed*, his goods are yet unpaid for. We are of opinion that the plaintiff should have judgment on the demurrer.

Judgment for plaintiff on demurrer.

KEYWORTH V. THOMPSON.

Mortgage—Proviso for notice in writing demanding payment—Notice signed by attorney—Proof of authority.

Where a mortgage provided that no means should be taken by the mortgagee to obtain possession of the land, until he should have given to the mortgagor one calendar month's notice in writing, after default made, demanding payment—*Held*, in ejectment by the mortgagee, that a notice signed by the plaintiff's attorney, who was also his attorney in a suit brought upon the covenant more than a month before this action, was sufficient, without any proof of authority.

EJECTMENT, for lot No. 12, in the second concession south of the Durham road, in the township of Kincardine. Defence for the whole.

At the trial, at Goderich, before *McLean, J.*, it appeared that the action was upon a mortgage, made on the 21st of March, 1855, by defendant to plaintiff. It was provided in the mortgage, that if the defendant should pay to the plaintiff £146 on the 21st of September, 1856, then the indenture should be void, and that it should be lawful for the plaintiff after default should be made in payment, to enter upon the land, and to hold and enjoy the same. And it was further declared, that if the defendant should not pay the money according to the proviso, and if the plaintiff (the mortgagee), his executors, administrators or assigns, should, after the time limited for the payment had expired, have given to him, or have left for him at his last or most usual place of abode, in this province, notice in writing demanding payment of the money and interest, and one calendar month should have elapsed from the delivery or leaving of such notice without such payment having been made, it should be lawful for the plaintiff, without any further consent of the defendant, to enter into possession of the said lands, and to receive and take the rents, &c, and to sell or lease the same. And the plaintiff covenanted with the mortgagor that no means should be taken for obtaining possession of the land by the plaintiff until the calendar month's notice should have been given or left as aforesaid, demanding payment of the money due.

It was proved on the trial, that on the 21st of July, 1857, a written notice was served on the defendant personally, in the name of the plaintiff's attorney, that on behalf of the plaintiff he claimed payment of the principal and

interest due on this mortgage. The notice was dated the 7th of July, 1857.

It was objected, that this notice was served by an attorney, and no proof given of his authority, and that there was no evidence of default for a month after service of the notice.

The learned judge over-ruled the objection, but reserved leave to the defendant to move. The jury, however, gave their verdict for the defendant.

Richards obtained a rule on defendant to shew cause why a new trial should not be had without costs, on the law and evidence, and because sufficient notice was proved, demanding payment of the mortgage money, and more than a month had elapsed between the service of such notice and bringing the action, and because the verdict was against evidence, and the judge's charge, and was perverse.

Hector Cameron shewed cause, citing *Copp v. Holmes*, 6 C. P. 373.

Richards, in support of the rule, cited *Goodtitle v. Woodward*, 3 B. & Al. 689; *Wilmott v. Smith*, Moo. & Mal. 238, S. C. 3 C. & P. 453; *Watson v. Hetherington*, 1 C. & K. 36; *Bingham v. Allport*, 1 N. & M. 398.

The defendant, by his affidavit, positively denied that any notice or demand to pay the mortgage money was served upon him at any time before the action was brought.

ROBINSON, C. J., delivered the judgment of the court.

We think there is no question that the verdict ought to have been for the plaintiff. In the first place, there was evidence of the service of a month's notice in writing to pay the money, though that is now denied by the defendant's affidavit; and though it was objected that such written notice was given by the plaintiff's attorney, and not by himself, yet we have no doubt that that would create no difficulty, for this is not like the case of demanding payment of money under an award, where it must be shewn, in order to subject the party to attachment for not paying, that the person making demand had a regular authority to receive the money. Here the attorney who gave the notice was the plaintiff's attorney of record, and in action of covenant

brought upon the mortgage to recover this same money. He had actually therefore authority to receive the money, and payment to him would have acquitted the mortgagor.

But, moreover, the object of the notice was not to have the money paid at once to the person giving the notice: it was only an intimation given on behalf of the plaintiff that if the money were not paid in a month the plaintiff would proceed to compel payment.

The defendant, besides, admits that he had been served a month before this action of ejectment was brought with a summons, in an action upon the covenant, in which action the plaintiff recovered, at the same assizes. This of itself would be as formal as a notice could be given that the plaintiff desired the money to be paid; so that we think the ground of the defence failed, and the plaintiff ought to have had a verdict.

Something was said upon the argument of this being a hard case upon the defendant, on account of an exorbitant interest being secured upon the mortgage; but as the law now stands we can no longer talk of usury. The law protects a party against the necessity of paying in an action more than six per cent. interest, therefore in that respect there is a security against hardship; and there is no doubt, we suppose, that the defendant is at least under the necessity of paying the principal, with six per cent. interest upon it; and the non-payment of that gives the plaintiff a right to possession under the mortgage.

The defendant's remedy seems obvious, if he wishes to restrict the plaintiff to the ordinary rate of interest. In the mean time there should, we think, be a new trial, without costs.

Rule absolute.

HOOKE ET AL. V. GURNETT.

The clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury.

This was a special case stated for the opinion of the court.

The plaintiffs brought four actions, in this court, and the Common Pleas, in which they applied for and obtained a

judge's order in each to strike a special jury of merchants and traders, under the 13 & 14 Vic., ch. 55, sec. 45.

Elisors were accordingly duly appointed in each case, who attended at the office of the Clerk of the Peace (the defendant) in Toronto, for the purpose of striking such jury.

The Clerk of the Peace, by his deputy, having been notified that special juries were to be struck at his office, at an appointed hour, was in attendance, and prepared the lists from the jury books, and provided the ballot-box and panels (which are kept in his office), and he acted in striking the said juries, the elisors also assisting.

The lists having been made up the elisors signed them, and certified them to the sheriff, according to the directions of the statute.

The Clerk of the Peace afterwards rendered his account, for striking such special juries, to the plaintiff's attorney amounting in the four cases to £27 7s. 6d., made up as follows, viz :

Drafting mixed special jury, 600 names			
on list, at 20s. per 100	£6	0	0
Entering panel	0	10	0
Certificates after panel	0	5	0
119 ballot tickets	0	2	6

And he referred to the 19 & 20 Vic., ch. 92, as warranting his charges, in connexion with 13 & 14 Vic., ch. 55, secs. 43, 46, 49, 81.

In one of the said cases, which came before the Master for taxation the charge of £6 17s. 6d., as paid to the Clerk of the Peace for striking such special jury, was disallowed by the Master, as not being warranted by the acts, and on appeal to the presiding judge in Chambers the Master's decision was confirmed.

In the other cases the plaintiffs failed, and so had no opportunity of bringing the questions up in them on taxation, but in all they contend they were called on to pay and did pay what the defendant was not legally entitled to demand. They have also paid the elisors.

The questions for the opinion of the court are,

1st. Whether such charges, so made by the defendant as

Clerk of the Peace, were warranted by the statutes, or any part of them ?

2ndly. If not, whether having been paid the plaintiffs are entitled to recover them back again as money paid to the defendant "*colore officii*," or how much ?

If the court shall be of opinion that the Clerk of the Peace was not entitled to make such charges, or any part of them, and that the plaintiffs are entitled to recover them back, then judgment to be entered for the plaintiffs for £27 7s. 6d.

If that the charges were properly made, under the act, or though not warranted, yet that having been paid the defendant is not liable to refund the amount, then judgment to be entered for the defendant.

But if the court shall be of opinion that the defendant is entitled to retain any portion of the said charges, but liable to pay back the difference, then judgment to be entered for that amount.

M. R. Vankoughnet for the plaintiffs.

Hallinan for defendant.

ROBINSON, C. J., delivered the judgment of the court.

Our opinion in this case is, that the claim of the Clerk of the Peace to the fees specified in the statment of the case cannot be maintained, under the statute referred to or on any other footing.

The table of fees established by this court in civil proceedings between party and party contains no allowance to the Clerk of the Peace for any service in striking a special jury, and the judges could not by law have made such an allowance.

What is said in the 49th section of the Jury Act, 13 & 14 Vic., ch. 55, can only be understood to refer to the fees payable to any officer of the superior courts under the established table of costs. The 81st section of the same act, on the other hand, as amended by 14 & 15 Vic., ch. 65, did provide fees for county officers for services to be rendered by them under the Jury Act, including services relating to the selection of jurors ; but it is quite clear that the services for which fees were provided in that clause were not services to be rendered at the call of either party in a cause, but

services exacted from the respective officers in the course of proceedings for selecting grand and petit jurors for the year, and preparing jury-books. Those are services rendered to the county, and the fees given for them in the act are expressly made payable out of the county funds. There could be no pretence for exacting from either of the parties in a cause any fee that is assigned to a public officer by that clause. No alteration was made in this respect by the amending act, 16 Vic., ch. 120; on the contrary, by comparing the provision made in that act for nominating the clerk of the peace with that made for nominating the sheriff, it is plain that the legislature did not contemplate that they had assigned any duty to the clerk of the peace which could give him a claim to a fee other than such as were to be paid out of the county revenue, while they expressly state that the fees which they assign to the sheriff are to be exclusive of such fees as he may be entitled to from the parties in any suit.

The last statute upon this subject, 19 & 20 Vic., ch. 92, is the only one now in force, and it proceeds consistently upon the same principle; and it is quite clear that the statute gives no sanction to any fee being demanded by the clerk of the peace from either party in a cause for any service to be rendered under the jury laws.

And we must add, that we do not see that the services for which fees were charged in this case were services necessary to be rendered by the clerk of the peace, in order to the striking of a special jury. He had but to attend and exhibit his jury-book to the elisors, in order to enable them to see who were qualified to be on such a jury as they were directed to select.

We think there was clearly no authority for demanding any of the fees which have been paid; and it is a maxim of law that for services rendered in the administration of justice no fee can be demanded, except such as can be shewn to have a clear legal origin, either as being specifically allowed in some act of parliament, or as being sanctioned by some court or officer that has been permitted to award a fee for the service.

We refer on that point to Com. Dig. "Extortion" A. 2, "Officer" G. 15; to Co. Lit. 368, 2 Inst. 176, 208, 209; *Graham v. Grill*, 2 M. & Sel. 294.

There have indeed been cases in which a right to fees has been supported upon evidence of such long and general usage as was considered to amount to proof that the fee must have had a legal origin. Nothing of that kind can be advanced in this case.

We are of opinion, on the other branch of the case, that the fees which have been illegally exacted can be recovered back in an action for money had and received.—*Dew v. Parsons* (2 B. & Al. 562), *Morgan v. Palmer* (2 B. & C. 729), *Chitty on Contracts*, 5th Ed. 555.

The plaintiffs are entitled, according to our opinion, to have a verdict entered in their favour for £27 7s. 6d.

Judgment for plaintiffs.

EBENEZER WRIGHT AND ELIZA WRIGHT, HIS WIFE, v.
FRANCIS WRIGHT.

Will—Construction of—Estate in fee, or during widowhood.

Under the following will: "In the first place, my will is that my beloved wife shall inherit all my messuages and tenements, situated and lying in the township of Colchester, known and described by the half of lot No. 71, and lot No. 72, containing in all 300 acres, more or less, with the appurtenances thereunto belonging; also, all my personal estate, goods and chattels, of what kind and nature soever, I give and bequeath to my loving wife during her widowhood; and in case of her marriage or decease, then to be disposed of and equally divided between my sons and daughters," &c., (naming them). To my son J. S. I bequeath 100 acres of land (describing it). "And for the execution hereof I do hereby appoint T. M. and C. S. to be my executors of this my last will and testament, with full power and authority to do and perform every thing herein mentioned."

The will bore date 21st of August, 1818. On the 21st of September following this codicil was added:

"And further, it is my will that my youngest daughter, Eliza, born on the 23rd of August, during my sickness, should equally share with the rest of my children (naming them); and in case of the death of either of the above named children before the estate be divided, then their share to be justly divided between the survivors."

Held, that the widow took a fee in the land first mentioned: *McLean, J.*, dissenting, and holding that, upon the construction of the whole will, with the codicil, the direction for a division in case of her marriage or decease should be applied to the real as well as to the personal property.

EJECTMENT, for an undivided third part of lot No. 72, in the first or front concession of Colchester.

On the trial, before *McLean, J.*, at Sandwich, it was

admitted that John Stockwell died seized in fee of the premises: that he made his last will and testament on the 21st of August, 1818, and on the 21st of September following made a codicil to his will, and that he died soon after.

Three of the devisees named in the will were still living, Mary, Lucinda, and Eliza. Eliza and her husband, the plaintiffs, claimed under the codicil and will an undivided third part of the lands.

Francis Wright, the defendant, claimed as assignee of Nancy Stockwell, the widow and devisee in the will of John Stockwell, deceased, under a deed made in 1839. He also claimed under an assignment made by James Stockwell, heir at law of John Stockwell, in whom it was alleged the remainder vested, if the widow (now dead) had not an estate in fee under the will.

It was admitted that the defendant had a deed from Mrs. Stockwell, and also from John Stockwell, the heir at law, and that the plaintiffs could only recover if the estate under the will went to the three sisters.

A verdict was taken by consent for the defendant, subject to the opinion of the court; and a verdict was to be entered for the plaintiffs, if the court should find them entitled under the will.

The will of John Stockwell, so far as relates to the premises in question and other real estate and personal property, was as follows:

“ In the first place, my will is that my beloved wife, Nancy Stockwell, shall inherit all my messuages or tenements situate and lying in the township of Colchester, known and described by the half of lot No. 71, and lot No. 72, containing in all three hundred acres of land, more or less, with the appurtenances thereunto belonging; also all my personal estate, goods and chattels, of what kind and nature soever, I give and bequeath to my loving wife Nancy Stockwell, during her widowhood; and in case of her marriage or decease, then to be disposed of and equally divided between my sons and daughters, James Stockwell, Charles, Sarah, Hannah, Mary, Nelly, Jane and Lucinda; to my son, John Stockwell, junior, I bequeath one hundred acres of land, commencing in the rear of thirty-six acres from the front of lot No. 71, from the east and

west lines, be the same more or less; and, lastly, I do bequeath to my sons and daughters, Isaac Stockwell, William, Alexander, Elizabeth and Nancy, one shilling sterling each.

"And for the execution hereof I do hereby appoint Theodoros Milot and Charles Stewart, junior, to be my executors of this my last will and testament, with full power and authority to do and perform everything herein mentioned. In witness whereof I have hereunto set my hand and seal, in the township of Colchester, this twenty-first day of August, one thousand eight hundred and eighteen.

"(Signed) JOHN ^{His} + STOCKWELL. [L.S.]
mark.

"Signed, sealed and published, in
the presence of

"A. McDONALD,
"TIMOTHY SHAW,
"LOUIS VISINEAUX."

"And further, it is my will that my youngest daughter, Eliza, born on the twenty-third day of August, during my sickness, should equally share with the rest of my children, viz., James, Charles, Sarah, Hannah, Mary, Nelly, Jane, and Lucinda; and in case of the death of either of the above named children before the estate be divided, their share to be justly divided between the survivors.

"In witness whereof I have hereunto set my hand and seal, in the township of Colchester, this twenty-first day of September, one thousand and eight hundred and eighteen.

"(Signed) JOHN ^{His} + STOCKWELL. [L.S.]
mark.

"Signed and sealed in presence of

"A. McDONALD,
"TIMOTHY SHAW,
"RUDOLF HUFFMAN."

O'Connor, obtained a rule *nisi* to enter a verdict for the plaintiffs, pursuant to leave reserved.

Bell (of Toronto) and *Prince* shewed cause, citing *Doe Ellam v. Westley*, 4 B. & C. 667; *Right v. Sidebotham*, Dougl. 734; *Preston on Estates*, 268; *Ridgeway v. Munkittrick*, 1 Dru. & Warr. 84; *Thomlinson v. Dighton*, Salk. 239.

J. Wilson, Q. C., and *Blevins* supported the rule.

ROBINSON, C. J.—My opinion on this will, which was made in 1818, is that it gives to the wife of the testator

the fee in the land devised, and all the personal property, upon his wife's marriage or death, to and among his children named in the will.

The codicil cannot have the effect of cutting down the estate of the widow in the land to a life estate; for all that it has done is to direct that her daughter Eliza shall share equally with her other children named in the property which had been bequeathed by the will to them, and beyond all question it is personalty only that they are to share in by the will.

I think the verdict is right as it stands: that is, in favour of the defendant, who claims under a deed made by the widow.

It seems very probable that the testator did intend real as well as personal estate to go to the wife's children after her death or marriage, but I think we could not go the length of giving that effect to it without making a will for the testator, which in many cases the courts have disclaimed a right to do.

MCLEAN, J.—The will commences by stating that the testator, John Stockwell, was, at the time it bears date, "sick in body, but in his sound sense and mind;" and it proceeds to dispose of the property as follows: "In the first place, my will is that my beloved wife, Nancy Stockwell, shall *innerit* all my *messuages or tenements*, situate and lying in the township of Colchester, known and described by the half of lot No. 71, and lot No. 72, containing in all three hundred acres of land, more or less, with the appurtenances thereunto belonging; also, all my *personal estate*, goods and chattels, of what kind *and* nature soever, I give and *bequeath* unto my loving wife, Nancy Stockwell, during her widowhood; and in case of her marriage or decease, then to be disposed of and equally divided between my sons and daughters, James Stockwell, Charles, Sarah, Hannah, Mary, Nelly, Jane and Lucinda. To my son John Stockwell, junior, I *bequeath* one hundred acres of land, commencing in the rear of thirty-six acres from the front of lot No. 71 from the east and west line, be the same more or less: and lastly, I do bequeath to my sons and daughters, Isaac Stockwell, William, Alexander, Elizabeth and Nancy, one shilling *sterling* each.

And for the *execution hereof* I do appoint Theodorus Milot and Charles Stewart, junior, to be my executors of this my last will and testament, *with full power and authority to do and preform every thing herein mentioned.*"

This will bears date the 21st of August, 1818, and professes to be executed before A. McDonald, Timothy Shay, and Louis Visineaux. The codicil is as follows: "And further, it is my will, that my youngest daughter, Eliza, born on the twenty-third day of August, during my sickness, should equally share with the rest of my children, viz., James, Charles, Sarah, Hannah, Mary, Nelly, Jane and Lucinda; and in case of the death of either of the above named children *before the estate be divided*, their share to be *justly divided* between the survivors." This codicil bears date the 21st day of September, 1818, just a month after the execution of the will, and like the will has *three* subscribing witnesses to its execution, two of whom are witnesses to the will.

John Stockwell, the testator, died soon after the making of the codicil providing for his infant daughter Eliza, and the property remained in the possession of his widow from 1818 till 1839, about twenty-one years. The defendant then obtained a deed from her; and fearing that there might be some question as to the validity of the title thus obtained, he also procured an assignment from James Stockwell, the heir at law of the testator, as well as of his mother.

It is, I think, clear that the testator, in making the codicil, intended to make some provision for the infant born during his illness after the date of the will. That is the sole object of the codicil, except to declare that in case of the death of either of his other children with whom she was to share, before the *estate was divided*, then the share of such one must be justly divided between the survivors. The *estate*, as it is called in the codicil, could not be divided till after the death or marriage of the widow, as the intention is manifest, that in the event of her continuing a widow she should be entitled to enjoy the lands and personal property during her life.

The question now is, what *estate* was to be divided in the event of her death or marriage? Was it the whole property, real or personal, or was it merely the personal estate from which a provision was to be made for his children? The defendant contends, that by the *terms* used in the will the testator gave to his widow an estate in fee in the lands specified; if so, then the defendant has a good title, and the verdict is right. It becomes necessary then to examine these terms, and to ascertain from the whole context of the will whether these terms must be taken in their strict legal acceptance, or whether the meaning and intention of the testator do not appear from the tenor of the will to be to make a disposition of his property different from what a rigid legal interpretation might seem to require. It is plain, I think, on examining the language used in the several devises and bequests, that the person who drew the will used legal terms, the import and meaning of which he did not understand, and of which the testator, being so illiterate as to have made his mark to his will and codicil, must in all probability have been equally ignorant. If it was intended by the testator that his widow should take an estate in fee in his three hundred acres of land, and that his son John should take the same estate in the hundred acres allotted to him, it is strange that there should be such a variance in the terms used for the purpose of granting these several estates. With respect to the larger and more valuable portion of his property to be enjoyed by his wife, the testator is made to say, "My will is, that my beloved wife, Nancy Stockwell, shall *inherit* all my *messuages or tenements*, situate and lying in the township of Colchester, known and described as half of lot No. 71, and lot No. 72, containing in all three hundred acres of land, more or less, with the appurtenances thereunto belonging. In the devise to his son John, which undoubtedly was intended to convey a fee, the language is, "To my son John Stockwell *I bequeath* one hundred acres of land," not using any form of words which could shew that an estate of inheritance was intended to be conveyed. Then in the devise to the widow he expresses his will to be that she shall *inherit* all his *messuages or tenements*

in the township of Colchester. It is clear that she could not *inherit* his lands in any way, and that, unless devised to her, she could claim no interest to the exclusion of her children except her dower. She did not therefore *inherit*, but she must have taken, if at all, as a devisee under the will; and the estate which she took must depend upon the construction of the whole will, and not merely on the import of the word *inherit*, which was evidently *misapplied*, whatever the interest may have been which the testator intended to convey.

Then in the description of the property which the widow was to enjoy under the will, the terms *messuages* or *tenements* seem to have been considered as synonymous, though the former merely signifies *a house*, and the latter is an extensive term, whereby all lands and inheritances may pass (Doe Clements v. Collins, 2 T. R. 488, Co. Lit. 6a., 1 Lev. 188); but the subsequent part shewing clearly what property was intended to be designated as the testator's messuages or tenements which the widow should enjoy, no question arises on the use of these inappropriate words, and I refer to them in confirmation of my remark, that in drawing the will legal terms have been used, of the import or meaning of which the parties must have been wholly ignorant.

This then being apparent upon the face of the will, it appears to me that the strict legal meaning of the terms used cannot properly be given to them, if, from the whole tenor of the will and the codicil, a different interpretation appears to have been intended by the testator.

The rule is, that the technical words shall have their legal effect, unless from subsequent portions of the will, or inconsistent words, it is clear that the testator meant otherwise.—Doe Wright et al. v. Jesson et al. (5 M. & S. 95), same case in Error (2 Bligh 1), Fen v. Lowndes (4 Burr. 2246), Baddeley v. Leppingwell (3 Burr. 1533), Hill v. Chapman (1 Ves. Junr. 407). Now the intention of the testator must be collected from the whole will and codicil, on a fair and reasonable construction of the writing itself. Taking this then as the guide in questions arising as to the true interpretation of wills, I find that in this case the testator, after expressing his will that his wife should inherit his three hundred acres of land,

proceeds as follows: "Also all my *personal estate*, goods and chattels, of what kind and nature soever, I give and bequeath to my loving wife Nancy Stockwell, *during her widowhood*;" At the end of this disposition of the personal estate, goods and chattels, there is precisely the same punctuation or stop, a semicolon, which there is at the end of the disposition relating to the messuages or tenements; and the will, in a new paragraph, proceeds thus, "And in case of her marriage or decease, then to be disposed of and equally divided between my sons and daughters," whose names are mentioned. Now it appears to me that this latter clause, directing a division amongst his sons and daughters upon the death or marriage of the widow, applies as well to the devise relating to the real estate as to that which immediately precedes it, affecting only the personal property.

There is certainly nothing to shew that it was intended to be confined to the goods and chattels. The punctuation is the same at the end of each paragraph of the will, and it is not stated what shall be divided. I confess, under these circumstances, that I cannot perceive why the division directed to be made amongst certain of the testator's children should not apply as well to the lands as to the personal property. It is true that the testator, in reference to the land, makes use of words, which if their legal signification must be given to them, would convey a fee to the widow, while with respect to goods he shows very clearly that the widow was only to enjoy them during her widowhood; but from the manifest ignorance which appears so plainly in every part of the will in the use of legal terms, and the apparent absurdity of the testator directing his personal property to be divided amongst his children on the marriage of his wife, and leaving to her absolutely a large and valuable landed estate, whether she continued his widow or not, I think it is not by any means a strained construction to consider the direction for the division of the property amongst the children as applying to the real as well as the personal property. The codicil appears to me strongly to favour that construction. It gives to Eliza, one of the plaintiffs, equal interest in the property given by the will to

the testator's other children; and it provides that in case of the death of either of those with whom she was to share before the *division of the estate*, the portion intended for that one was to be divided amongst the survivors. This does not refer to the division of the personal estate merely: it is the *whole estate*. If it was intended to apply to the personalty *only*, it is not unreasonable to suppose that some mention would have been made of goods and chattels, and that a word would not have been used which comprehends real as well as personal property. It may be said that it refers to the same *estate* which was willed to the other members of the family; but if that were so, then another instance is afforded of the use of a term having a well known legal signification in a sense materially different from such signification.

Besides these grounds for the construction which I have felt obliged to place upon the will, the power specially conferred upon the executors seems to afford an additional argument. After naming two persons to be his executors, he gives them "*full power and authority to do and perform every thing therein mentioned.*" Now the power of the executors to carry out the directions of the will, in reference to personal property, could scarcely have been unknown to the testator and the person who wrote the will, and the granting in a particular manner full power to do and perform every thing therein mentioned, seems to point to something more than the mere division of goods and chattels on the death, or marriage of the widow. If it was specifically given with a view to the division of real estate, as I think it was, it may account for the direction in the codicil, that the share of any of the children who might die before the division of the estate should be *justly* divided between the survivors.

The view which I have taken of the fair and reasonable construction of the will, derives certainly additional support from the consideration of the extreme improbability that the testator intended to give to his widow, to the exclusion of a large family of children, all his real estate to be disposed of as she might think proper, and not depending upon her continuing his widow, while at the same time he limited her

interest in his goods and chattels to the term of her widowhood. It does not seem reasonable to suppose that the goods and chattels were all that the children were to be entitled to after their mother's death, and in my opinion the will was not so limited in its terms and operation as to confine their interest to the personal property alone. I am aware that extraneous matters, and mere conjectures, cannot be allowed to have any influence in deciding upon the construction of a will of any other instrument under seal, and I merely refer to the probabilities of what was the testator's intention as affording strong confirmation of the opinion I have formed as to the construction of the will itself.

To shew how far the courts will go to give effect to what appears to be the intention of a testator, many cases might be cited. I will, however, only refer to that of *Molyneux v. Rowe*, in the 39th volume of *English Law and Equity Reports*. A testator by his will gave all his real and personal estate to trustees for the benefit of his granddaughter. By a codicil he gave the *whole of his estate*, and all his household goods, &c., and all other his personal property, free from legacy duty, to his servant; and he declared that he ratified and confirmed his will in all other particulars thereof. The Vice Chancellor of the Duchy of Lancaster held that on the construction of the whole will and codicil the real estate did not pass under the codicil; and upon appeal the same was affirmed by Lord Justice Knight Bruce, Lord Justice Turner dissenting, considering the codicil to operate upon the real estate.

In coming to the conclusion that the plaintiffs are entitled to recover, I confess that I have done so with a good deal of doubt and hesitation, knowing the strong view to the contrary which is entertained by my brother judges; but as I could not adopt that view I have felt it incumbent upon me to express my own opinion, however erroneous it may be.

BURNS, J., concurred in opinion with the Chief Justice.

Rule discharged.

FLEMING V. MCNAUGHTEN.

Commissioner for taking affidavits—Appointment for district—Continuation of authority in counties—Chattel mortgage—Disproportion between value of goods and debt secured.

Held, affirming *Glick v. Davidson*, 15 U. C. R. 591, and dissenting from *Carter v. Sullivan*, 4 C. P. 298, that a commissioner appointed in 1840 for the district of Gore and Wellington, might, after the passing of 12 Vic., ch. 78, and 14 & 15 Vic., ch. 5, continue to take affidavits in Galt, which was formerly within the Gore district.

Where the debtor mortgaged all his personal property of every description, including the most trifling articles, to secure a debt very small in proportion to the value of the goods—*Held*, that although no evidence of value was given, and the *bona fides* of the debt was not disputed, it should have been left to the jury to say, whether these circumstances were not sufficient to shew that the deed was made not for the security of the assignee, but for the purposes of the debtor, and to shield his property from other creditors.

INTERPLEADER ISSUE, to try whether certain goods and chattels were the property of one James H. Williams on the 1st of July, 1857.

The trial took place at Berlin, before *Burns, J.*, and it was admitted that the execution debtor, Williams, had executed a chattel mortgage to the plaintiff upon the goods in his possession, dated 7th of June, 1857, to secure the payment of the sum of £118 16s. 9d. on the 9th of June, 1858, and that the affidavit of execution and the debt being due was duly attached, and the instrument was filed in the office of the clerk of the county court on the 10th of June, 1857. No attempt was made to impeach the debt as not being *bona fide* due to the plaintiff, but it was contended that in law no proper affidavit of execution or of the debt being due, was attached to the instrument, because it was proved that the commissioner before whom the two affidavits were made had no legal authority to administer the oath.

The authority under which the commissioner acted was a commission signed by the Chief Justice of this court, Mr. Justice Macaulay, and Mr. Justice Jones, dated 5th of August, 1840, authorising him to administer oaths for the district of Gore and Wellington. The affidavits were sworn before the commissioner at Galt, in the county of Waterloo, on the 9th of June, 1857. At the date of the commission, 5th of August, 1840, Galt was in the district of Gore, being in the township of Dumfries. The first change from districts into counties

was made by statute 12 Vic., ch. 78, and under that statute the Gore district was divided into the counties of Wentworth and Halton, and united for judicial purposes, and the district of Wellington was made the county of Waterloo. The next change was made by statute 14 & 15 Vic., ch. 5; and under that act North Dumfries, in which township Galt was situated, was attached to the county of Waterloo, and the whole tract which previously composed the county of Waterloo was divided into three counties—namely, Wellington, Waterloo, and Grey—the town of Galt being in the county of Waterloo, and the three being united for judicial purposes, with Wellington as the senior county. In the month of January, 1853, the county of Waterloo became disunited from the union of counties under the provisions for enabling junior counties to separate from the union of counties. No new commissions for administering affidavits were issued, but the commissioner who administered the oath in this case, with others, acted on the former commissions.

The learned judge reserved leave to the defendant to move to enter a nonsuit, or a verdict for defendant, if the commissioner was not legally authorised to administer the oaths, and directed the jury to find a verdict for the plaintiff.

The defendant's counsel contended that it was a question of fact for the jury to say, whether the deed was a fraudulent transfer of the property to the plaintiff, notwithstanding it was made to secure a *bona fide* debt due him, because the deed purported to convey and transfer not only farming stock and implements, and household furniture, but also crops then in the ground, such as wheat, oats, potatoes, peas, and other crops, and yet gave the debtor a year to pay the debt in.

The learned judge declined to leave the question to the jury as one of fact upon the language used in the deed, and stated that he did not see, because for the greater security of the debt to the plaintiff the debtor had transferred to him crops then growing in the ground, and with respect to which he must perhaps rely upon the honesty of the debtor, if the creditor did not harvest them himself, and give him a year in which to pay the debt, it followed that the security was

therefore perilled, and in danger of being lost, or that being so it was *per se* a fraudulent transfer; and that the construction of the instrument, and the deductions to be drawn from the language, were matters for the court, and not for the jury; and that, in the absence of any evidence to impeach the validity of the debt due, but it being admitted that it was due, or any evidence to shew the value of the property conveyed, or prove that it was dealt with by the debtor in the mean time, he did not see what question of fact was involved beyond the construction to be placed upon the deed.

Freeman, Q. C., during last term, obtained a rule to shew cause why the verdict should not be set aside, and a verdict entered for defendant, pursuant to the leave reserved, or why there should not be a new trial on the ground of misdirection. He cited *McWhirter v. Corbett et al.*, 4 C. P. 203; *Carter v. Sullivan et al.*, *Ib.* 298.

M. C. Cameron shewed cause, citing *DeForrest et al. v. Bunnell*, 15 U. C. R. 370; *Glick v. Davidson*, *Ib.* 591.

ROBINSON, C. J.—As to the legal exception taken to the authority of the commissioner to administer the affidavits, it would be sufficient, as I suppose, in the first instance to shew that the person who administered the oath was in the usual exercise of the office of commissioner, without giving evidence of his appointment. That would be the course, if the person making the affidavit were indicted upon it for perjury, but still it would be open to the defendant on such a trial to shew that in fact the person who acted as commissioner had not authority, either generally or in the particular case; and therefore I conclude that it was open to the defendant in this case to prove that the oath was not lawfully administered, because the person who acted in the matter had not in fact proper authority. The statute in force when this affidavit was sworn required that the oath should be administered by a commissioner of the Queen's Bench or Common Pleas, not adding "for the county in which the affidavit shall be sworn." The last statute, which however had not then been passed (20 Vic., ch. 3, sec. 3), does not leave room, I think, for such an objection as was taken in this case, for it directs

that the affidavits required by that act shall be taken and administered "by any judge or commissioner of the Courts of Queen's Bench or Common Pleas, or Justice of the Peace in *Upper Canada*." I am not quite clear that the former statute, 12 Vic., ch. 74, might not be held to mean the same thing in effect, for there are no restrictive words, and there are some acts merely ministerial which may be done by public officers wherever they may happen to be.

Without determining at present whether this is or is not one of such acts, we seem to have in effect determined this case by our judgment given in *Glick v. Davidson* (15 U. C. R. 591). In the case of *Carter v. Sullivan* (4 C. P. 298) the Court of Common Pleas appear to have given an opinion unfavourable to the authority of the commissioner, under similar circumstances. The question, however, is not much gone into, and the learned Chief Justice of that court, who alone gave the judgment of the court, merely stated, after citing the different clauses of the statutes upon which the question turned, that he found no sufficient authority for holding the authority of the commissioners (to take bail) in that case as extended to or continuing in the county of Brant after its separation.

Whether it was a continuing authority or not, after the new organization of territory, depended on the intention and effect of the statute cited in that judgment, and in the case of *Glick v. Davidson* in this court. I infer from the argument of counsel in *Carter v. Sullivan*, that the reason why the authority of the commissioner was supposed not to be a continuing authority after the new arrangement, was that he was not a county officer, but an officer appointed by a court; but I do not think the 37th clause of 12 Vic., ch. 78, should receive so limited a construction. A commissioner for taking bail and administering oaths is certainly a person "holding office, and bearing lawful authority." And when we consider that the legislature made no other provision on the subject, and that they could not have intended to leave the want wholly unprovided for, which would have occasioned great injury and inconvenience to the public, we are bound, I think, to hold that the effect of the 18th and 37th clauses

of the 12 Vic., ch. 78, and of 14 & 15 Vic., ch. 5, sec. 3, was to continue the authority of the commissioner in this case to act within that part of the former district of Gore within which he resided, and for which he was authorised to act while it formed part of the district of Gore.

Upon the other ground on which a new trial has been moved, the learned judge seems to have understood the defendant's counsel to contend that upon the very face of the assignment there was fraud apparent, without the aid of extrinsic evidence; but that perhaps was not what the learned counsel meant, for I can perceive nothing in the nature of the arrangement made by the deed that affords any inference of fraud: I mean as to the disposition of the property, or the occasion of making it, or on account of any reservation contained in it. The good faith of the assignment was not disputed, so far as the existence of the debt was concerned, which it secured; on the contrary, it was conceded. But what the defendant's counsel, I have no doubt, intended to urge was, that there was room given for suspicion in the circumstance of an apparent disproportion between the value of the property assigned and the debt to be secured, and that it was also a suspicious circumstance that the debtor seemed careful to embrace every thing he possessed, whether of much or little value: things the most trifling, but at the same time indispensable for family use; his adding the tools of the trade and every article of household furniture, and ending, after a most particular enumeration, with the general words "and other miscellaneous articles on the premises, including barrels and boxes, with contents, in the barn." I confess I should have been much inclined, sitting as a juryman on such a case, to look with suspicion upon the assignment, and to ask whether it had not another object in view beyond the merely securing the £119: namely, to make that debt the pretence for sweeping every thing out of the reach of an expected execution, or to prepare the way for contracting new debts without running the risk of being obliged to pay them. Still, all that was a question for the jury, I think, rather than the court, and as the defendant called no witnesses to prove the value of the goods assigned, there was

no evidence given to the jury upon the subject of value ; but still it would have been proper, I think, to call the attention of the jury to the grounds of suspicion, and let them pronounce upon them. The horses and growing crops, with a few other principal articles, might have been enough, I should have thought, without the household furniture, to secure the debt. Not that it is fraudulent to take a mortgage on property much more than sufficient to cover the debt, for it is done every day, and no such imputation is suggested by it; but it is a circumstance, when joined with others, which may produce a strong conviction that the object was to make the debt a cover for protecting every thing, not for the sake of the creditor intended to be secured, but for the convenience of the debtor. And it can never be held that a debtor can be allowed to make a debt of £20, for instance, the means of covering £500 worth of property, every article he may happen to have, from his other creditors for any time he may think proper.

In my opinion, when we look at this assignment, and consider it with more attention than can always be given to a document during a trial, we must be satisfied that there was strong ground for putting it to the jury as a question fit for them to determine, whether upon the face of the instrument, with the knowledge which they may be supposed to have of the value of such articles as are named, and accompanying it with the amount of the debt, they were not satisfied that there must have been a secret understanding between these parties that the instrument was intended to be made use of for protecting the debtor's goods against other creditors, not for the security of the assignee, but for the purposes of the debtor himself, as far as regarded a large portion of the goods covered by the assignment, if not the whole. It does not seem in the slightest degree probable that any creditor having a debt of £119 only due to him, would desire to have a mortgage upon a rocking-chair and books, and empty boxes and barrels, and every article of household furniture, besides having specifically mortgaged to him a pair of horses and a quantity of other stock, carriages, harness, &c., and from twelve to fifteen acres of growing crops a few weeks before they would be ready for harvest.

What is said by the court in the case of *Benton v. Thornhill* (2 Marsh. 429,) and in *Twyne's case* (3 Co. 81, *a*), shews that in this case it would have been proper to submit the consideration which I have mentioned to the jury.

There should therefore, I think, be a new trial, with costs to abide the event.

BURNS, J.—With respect to the point which was reserved to the defendant at the trial, upon which to move to enter a verdict in his favor—that is, whether the person who administered the oaths as to the validity of the debt and the due execution of the mortgage had any authority to administer those affidavits—I am of opinion he had such authority. Mr. McCrume held a commission which gave him authority to administer affidavits in the districts of Gore and Wellington respectively. The 37th section of 12 Vic., ch. 78, enacts, that “Her Majesty’s justices of the peace, and other persons holding commission or office, or bearing lawful authority in the different districts in Upper Canada from which judicial and other proceedings are by this act transferred to the several counties and unions of counties in the same, as set forth in the schedule, shall continue to hold, enjoy and exercise the like commission, office, authority, power and jurisdiction, &c., to all intents and purposes whatsoever, as if their respective commissions or other authorities were expressed to be for such county or union of counties, instead of for such district respectively.” Now, although it may be argued that the words *commission*, and *office*, as used in the act, must be construed to mean a commission or office held under the great seal, or an appointment from the Sovereign, as distinguished from a commission from the judges of the different courts for taking affidavits, yet there are the words also, *persons bearing lawful authority*. I think it cannot be questioned that at the time the act 12 Vic., ch. 78, was passed Mr. McCrume was a person bearing lawful authority within the districts of Gore and Wellington, for he held an authority from the judges of the Court of Queen’s Bench to administer affidavits by a commission signed by the judges, and which commission was itself authorised by

act of parliament. It must be, either that the legislature intended, immediately upon the act 12 Vic., ch. 78, coming into operation, that all commissioners for taking affidavits should cease to have any authority to administer affidavits without new commissions taken out for the counties, or that words not comprehensive enough to preserve the authority have been used. I cannot imagine the first proposition can be maintained, namely, that the legislature, by dividing the districts which had formerly existed into counties and unions of counties, did so with any intention of thereby avoiding the authority of commissioners taking affidavits in the course of legal matters and proceedings. Then it appears to me the words are large enough to shew that the authority of all bearing lawful authority was preserved. The judge of the county court, the sheriff, and other officers, certainly did not require new commissions, and though such persons came under the words, "holding commission or office," yet the other words are much wider and embrace many others, namely, "persons bearing lawful authority." It appears to me that after the 12 Vic., ch. 78, came into operation Mr. McCrume's authority extended to take affidavits for the united counties of Wentworth and Halton, which had composed the Gore district, and were united for judicial purposes, and to the county of Waterloo, which composed the district of Wellington. The next change made was that of erecting the county of Waterloo into three counties, namely, Wellington, Waterloo and Grey, with Wellington as the senior county; and in this change North Dumfries, in which Mr. McCrume lived, was annexed to the county of Waterloo. The third section of the act making this change, 14 & 15 Vic., ch. 5, enacts that the provisions of the 37th section shall apply to changes made by the subsequent act. If Mr. McCrume's authority had been confined to the district of Gore, then possibly it might have been a question, when North Dumfries was attached to the county of Waterloo, whether his authority extended over the whole of that county, or of the united counties of Wellington, Waterloo and Grey, or only over North Dumfries, which had been detached from Wentworth and added to Waterloo; but that consideration is out of the question, for he held

authority by his commission to administer affidavits in both territorial divisions, and it mattered not to which his place of residence was attached. Waterloo was authorised to dissolve the union, and subsequently did so; and the question therefore is simply this, whether Mr. McCrume retained his authority to administer affidavits within the county of Waterloo, in which he resided, without asking the judges of the superior courts to grant a new commission. I have attentively considered the case of *Carter v. Sullivan* (4 C. P. 298) on the construction of those statutes, but confess my inability to take the view adopted in that case. No reasons are given why it should be held that the legislature, by the alteration of the territorial divisions of Upper Canada, either intended to destroy the authority of commissioners to take affidavits, or have not used sufficiently comprehensive words to preserve the authority. It appears to me that Mr. McCrume's authority was preserved throughout these different changes.

Upon the other branch of the case, I must admit I should not have recommended the jury to find a verdict for the plaintiff. The reason I fell into this error was that the parties came to court simply upon the question whether the commissioner had authority to administer the affidavits or not. The *bona fides* of the debt due the plaintiff was not questioned: it was admitted. No evidence was given to shew that the mortgagor had parted with all his property, or what the value of it might be with respect to the amount of the debt due the plaintiff, so as to raise any inference unfavorable to the validity of the transfer as a *bona fide* transaction. The defendant's counsel, in addressing the jury, took up the subject on the terms contained in the deed about assigning growing crops, and argued that fraud was to be inferred from that, and also from the fact of postponing the payment of the debt for a year. He contended afterwards that the jury should be told these were badges of fraud, and might be looked at to vitiate the deed. I remarked to the jury, that I could not infer any fraud from the terms of the deed, and I could not tell them so as a matter of construction. So far I think the direction was quite right, and is in accordance with what is said in the

cases of *Benton v. Thornhill* (7 Taunt. 149, 2 Marsh. 427), and *Martindale v. Booth* (3 B. & Ad. 498). Now although there was no evidence impeaching the debt due, nor to shew the value of the property assigned, nor that it was all the man had, still it was a question of fact, whether the creditor had made use of a *bona fide* debt to shield his debtor: that is, that notwithstanding his debt, the assignment was for the benefit of the debtor; and that question should be submitted to the jury. Although we have no doubt how the jury would have found in the absence of all evidence on the subject, still I should not have recommended them to find for the plaintiff, but should have asked them their opinion, whether the deed, though made to secure a *bona fide* demand, was or not made to shield the debtor.

McLEAN, J., concurred.

Rule absolute for new trial,
costs to abide the event.

BALKWELL ET AL. V. BEDDOME.

Assignment—Unfairness of trusts—Property assigned out of proportion to the debts proved—Affidavit of bona fides—Description of goods—12 Vic. ch. 74, 13 & 14 Vic., ch. 62.

A debtor, by deed, reciting that he had become embarrassed by indorsing and as security for others, assigned all his property, both real and personal, including land worth about £1500, in trust to pay, *first*, the parties named in a schedule annexed, being those to whom he had become indebted on his own account, whose claim did not exceed £110; and, *secondly*, the other creditors who should execute the assignment. There was no evidence of more than a few trifling debts, amounting to about £150.

Held, that there was nothing in the nature of the trusts created for which the deed could be held void in law; but the jury having found in favour of the assignment, the court granted a new trial, considering that there was much grounds for suspecting that the few direct claims had been made a pretence for tying up all the debtor's property, and defeating other creditors.

Held, also, that the affidavit of *bona fides*, made (before the 20 Vic., ch. 3) by one of the assignees was sufficient; and that the assignment was not avoided by a delay of eight days in registering it.

Held, also, that the description of the goods assigned, set out below, was sufficient.

INTERPLEADER ISSUE. At the trial, at London, before *McLean*, J., it appeared that the goods had been seized by the sheriff of Middlesex, under a writ of *fi. fa.* from the Queen's Bench, issued on the 24th July, 1857, in the suit of *Beddome* (now defendant) against *John McKenzie*, *Donald McKenzie*, and *William McMillan*.

The plaintiffs claimed them under an assignment made to them by McMillan, one of the defendants named in the execution, on the 30th July, 1857.

This deed recited that McMillan had become embarrassed by indorsing and becoming security for others, and being unable to pay all the demands which had thus accrued against him, he was desirous of making a fair and equitable distribution of his property among his creditors, preferring those of them to whom he had become indebted on his own account. And in consideration of the premises, and of five shillings paid to him by these plaintiffs, he assigned to them certain real estate specified in the deed, and all his goods, chattels, merchandize, bills, bonds, notes, book-accounts, claims, and choses in action, judgments, evidences of debt, and property of every kind, and more particularly enumerated in a schedule annexed to the deed; to hold upon certain trusts: that is to say, to take possession of all the real estate, property and effects so assigned, and sell or dispose of the same, as to them might appear best; and from the proceeds to pay—1st. The charges attending the trust; 2ndly. To pay the parties named in a schedule annexed their respective claims as therein stated, without privilege among themselves. There were five creditors named in the schedule, whose debts as set down did not exceed in all £110, the largest being a debt of £50 to William Balkwell, the plaintiff. 3rdly. To pay the debts due to the parties respectively, who should become parties of the third part to the said assignment; and, lastly, to pay the surplus, if any, to the said McMillan.

The schedule of personal property assigned was in these words: "All the horses, mares, cows, heifers, calves, sheep, lambs, pigs, waggons, buggy, harness, farming utensils, hay, household furniture, books, and every other article or thing, on or about the south half of lot No. 24 in the third concession of the township of London.

The affidavit of Balkwell stated, in the usual form, that the assignment was made *bona fide*, and for good consideration, being for the sum of fifty pounds due and owing to him by the said William McMillan, and also in order to enable

him and the said Alexander McKenzie to liquidate the various claims of the creditors of the said McMillan, as in the said assignment or bill of sale set forth ; and also that the assignment was not made for the purpose of holding, or enabling the deponent and the said Alexander McKenzie to hold the goods, &c., against the creditors of the said William McMillan.

It was objected, that the assignment could not prevail because the affidavit required by the statute was made by only one of the assignees—namely, Balkwell,—and did not set forth the consideration ; and that the property was not sufficiently described to admit of its being identified. The assignment was filed with the county registrar on the 21st of July, eight days after it was executed ; and it was also urged that this delay in registry must avoid the instrument.

Leave was reserved to move for a nonsuit ; and upon the evidence the jury found for the plaintiffs, the claimants.

John Wilson, Q. C., obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved. He cited *Ross v. Conger*, 14 U. C. R. 525.

Connor, Q. C., shewed cause, and cited *Baldwin v. Benjamin*, 16 U. C. R. 52 ; *Olmstead et al. v. Smith*, 15 U. C. R. 421.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the evidence, and examined the assignment executed by McMillan, which assignment does not come under the statute of last session respecting chattel mortgages, 20 Vic., ch. 3, having been made before the act came into force.

With regard to some legal objections taken to that assignment, we are of opinion that it was sufficient that one of the assignees made the affidavit of *bona fides*, required by the then existing statutes. There is no direction in those statutes that all the assignees or mortgagees should make the affidavit, and we think it would not be a reasonable construction of the statute.

We are of opinion that the acceptance of the trust by one of the assignees was sufficient, and indeed the defendant's counsel gave up any objection on that point.

The assignment was registered before the execution came to the sheriff, though not till after it had issued, so it was in time, unless it should be held void because it remained for eight days unregistered. We think we should not be warranted in so holding, for the former statutes gave no directions, as the late act does, in regard to the time within which mortgages or assignments must be registered, but merely that they must be entered with the county clerk, not saying (as in regard to the change of possession when there is no registry) that it must take place immediately, nor any expression to that effect. So long then as no one has acquired a subsequent right, which should prevail by reason of the non-registry before such right was acquired, we should not be borne out by the act in declaring the assignment void for non-registry. That at least is our present conclusion. The new statute will leave no room for such a question.

As to the alleged insufficiency in the description of the goods, we must take that as at common law, and we think we cannot hold the assignment void on that exception. There is a great deal on which it can clearly operate, and what it was meant to pass is plainly enough expressed, so far as the requisitions of common law go.

It has been argued that the deed should be held void, on account of the disposition which it makes of the proceeds : in other words, the unfairness of the trusts it creates. That however does not, considering the nature of the objections, supply ground for a court of law holding the assignment wholly void, whatever might be the case if we had bankrupt laws in force here.

The cases of *Estwick v. Caillaud* (5 T. R. 420) and *Nunn v. Wilsmore* (8 T. R. 521) are strong authorities against our holding the assignment void on the face of it, on account of the nature of the trusts, for when *McMillan* made it he could have paid all or any of his creditors with his goods on any plan he pleased, or could have sold them, and paid such of them as he chose to prefer. If the trusts were objectionable on any ground that would entitle other creditors to seek remedy in equity, that would be their course ; but what the

defendant refers to in the objection I am now speaking of could be made no more of in a court of law than by urging it upon the consideration of the jury, as one argument, among others, to shew the want of honest intention.

But upon the evidence generally we do think it right that the opinion of another jury should be taken on the *bona fides* of this assignment. It is open to great suspicion on many grounds. There is no evidence of more than a few trifling debts, amounting in all to about £150, and yet McMillan has tied up all his property, including land sworn to be worth about £1,500, besides a great deal of personal property. It really has strongly the appearance of being a contrivance to put every thing out of the reach of those creditors who became so by holding McMillan's indorsement as surety for others.

We might not complain of him for being willing to prefer those creditors to whom he became otherwise indebted, for goods furnished to himself, or otherwise; but while there is no good reason why the holders of notes indorsed by him should be postponed to others, since they may have advanced their money on the credit of his name, it would be more than unreasonable that McMillan should make a few direct claims of small amount the pretence of tying up his property, real and personal, and thus defeat a particular class of creditors altogether.

We grant a new trial, with costs to abide the event.

Rule absolute.

BRODIE V. RUTTAN.

Mutual Insurance Co.—Right of treasurer to take chattel mortgage for debt due the company—Registry of such mortgage—Omission of deponent's addition—Action by treasurer for taking goods.

A treasurer of a mutual insurance company may take a chattel mortgage to himself for a debt due to the company; but it is more proper to make it to the company, and they have power to take it.

Such treasurer, as mortgagee, may maintain an action against a wrong-doer for taking the goods mortgaged, although he has no beneficial interest in them.

The fact that the debt is not due to the mortgagee himself does not prevent the mortgage from being registered under the statute.

The want of deponent's addition is no objection to an affidavit made for registry of a chattel mortgage.

Action for taking the plaintiff's goods. *Pleas*—1st. Not guilty; 2nd. The goods not plaintiff's.

At the trial, at Cobourg, before *Richards, J.*, it appeared that the plaintiff was treasurer of the Newcastle District Mutual Insurance Company, and in that capacity had taken a mortgage upon the goods of one Sylvester Lewis, to secure a debt due by him to the company for moneys which he had received as their agent.

There was no mention of Mr. Brodie's official situation in the record. He brought this action of trespass apparently in his private capacity, against the sheriff of the counties of Northumberland and Durham, for seizing the goods under several writs of *fi. fa.*

The mortgage was made by Sylvester Lewis, on the 13th of November, 1855, to David Brodie, "Treasurer of the Mutual Insurance Company of the Newcastle District," to secure £165, payable to *him*, with interest from the day, in monthly instalments of £27 10s. each, on the twentieth day of each month thereafter, commencing on the 20th of December, 1855.

There was no other mention of the insurance company in the mortgage, except in the addition given to Brodie, the mortgagee, as their treasurer.

In the affidavit attached to the mortgage for the purpose of registering under the statute, the plaintiff, Brodie, describing himself as treasurer of the Newcastle District Mutual Insurance Company, made oath that the mortgagor was justly and truly indebted to *him*, the deponent, as the treasurer of the said company, and as the mortgagee therein named, in £165: that the bill of sale by way of mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in it against the creditors of the said Sylvester Lewis the mortgagor.

The mortgage was registered on the 14th of November, 1855, and the registration renewed the following year, with a declaration or statement of the amount then due, in which the sum was declared to be due to him *Brodie*, the mortgagee named in the mortgage, saying nothing otherwise of his representing the company.

It was objected by the defendant's counsel that the plain-

tiff could not maintain this action in its present form, there being no debt due to *him* on the mortgage.

2ndly. That there was no particular addition given to the plaintiff in the affidavit of indebtedness filed with the mortgage for the purpose of registry.

3rdly. And that it appeared in the affidavit that there was nothing due to him individually, but only as treasurer.

4thly. That the statement filed for the renewed registry of the mortgage alleged the amount to be due to him personally, and it appeared in the evidence given upon the trial, that it did not truly describe the transaction in that respect, or as to the amount then due upon the mortgage.

5thly. That the plaintiff was described (in the mortgage) as treasurer, &c., and that the company had no authority under the statute 6 W. IV., ch. 18, sec. 3, to take a chattel mortgage.

Leave was reserved to move to enter a nonsuit on these objections, and the jury found in favour of the plaintiff, and £125 damages.

J. D. Armour obtained a rule *nisi* accordingly, to which *C. S. Patterson* shewed cause, and cited *Baldwin v. Benjamin* 16 U. C. R. 52.

C. Robinson supported the rule; citing *Holmes v. Vancamp* 10 U. C. R. 310.

ROBINSON, C. J., delivered the judgment of the court.

Upon the main question, the case of *Judd v. Read* (6 C. P. 362) tends strongly to support this action against an objection to which we should be reluctant to give way, for there is no reason to doubt that the mortgage was taken for a debt justly due, and without wrong done, or intended to be done to any one.

As to the first objection, the plaintiff's interest in the goods mortgaged is sufficient to give him a cause of action against a wrong-doer, although he is not the beneficial holder of the mortgage, but has it in trust for others: that is, supposing the transaction not to be invalid on any ground of public policy or otherwise.

2ndly. The want of any addition given to the mortgagee in his affidavit made for the purpose of registering this chattel

mortgage, cannot be treated by us as making void the registration.

The Chattel Mortgage Act does not direct that the deponent's addition shall be inserted. He is sufficiently identified as being the mortgagee. Our rule of court requiring the addition of the deponent to be inserted has no application to an affidavit made for such a purpose as this.

The third and fourth objections, we think, are immaterial. The first affidavit states the true nature of the debt, and unless the truth as it appears would shew the mortgage to be invalid, it can do no injury to the security, for it cannot be necessary to state the circumstances untruly in order to support the instrument.

The affidavit required to be filed for the purpose of renewal after the year must state the extent of the mortgagee's interest in the goods; which means the amount still due to him upon it, in whatever capacity it is due to him, whether as trustee or otherwise. It does not mean that no mortgage can be registered under that act, which has been taken for a debt not absolutely due to the mortgagee himself, but to some other whom he represents, or for whom he was acting.

And if indeed the law were such, then it would follow that the chattel mortgage act could not apply to such mortgages, and if otherwise valid they could not be held to be invalid under those acts for want of a registration which could not be obtained. Any such mortgage must then be left to stand or fall, upon such objections as could be raised against it upon other grounds.

It has been objected that the amount remaining due was not correctly stated in the declaration filed at the end of the first year. If any mistake of that kind had been made, we could not hold the security to be destroyed by it, though any wilful mis-statement for a fraudulent purpose might perhaps have that effect.

As to the substantial question raised, the statute does not contain any thing that prohibits the treasurer from taking a security to himself for a debt due to the corporation, nor any thing that seems directly inconsistent with it. At the same time it certainly does not direct or authorise him to take any such security to himself.

Then how does it stand at common law ? We do not see that the taking such a mortgage is contrary to public policy, or is in violation of any statute. The more obvious and proper course would have been to have taken it directly to the corporation. We do not apprehend that the corporation would be exceeding the powers given to them in taking a mortgage to secure a debt *bona fide* due to them. The third clause of the act indeed expressly allows it. This is not like the case of bonds taken for purposes which the law discountenances, and will only sanction when they are taken in the manner directed by the legislature, as bonds taken by sheriffs for ease and favour ; and, again, it is not the person who gave the security that is here disputing its validity, but the sheriff, acting for the benefit of the person who is a stranger to the mortgage, though interested in defeating it.

In our opinion—there being no ground laid for supposing fraud of any kind, and the mortgage being taken for a meritorious and honest purpose, namely, to secure a sum due to the insurance company by a person who had misapplied their funds : and the purpose for which it was taken, namely, to secure a debt due to the company of which the plaintiff was treasurer, being apparent on the face of the security—there is no legal ground on which the defendant in this action can deny that the plaintiff has an interest in the goods under the mortgage, sufficient to entitle him to enforce the mortgage for the company's benefit.

We think, therefore, that the rule *nisi* for nonsuit must be discharged.

Rule discharged.

SINCLAIR V ROBSON.

Promissory note—When due—Writ issued on last day of grace—14 & 15 Vic., ch. 94, sec. 1.

An indorsee of a note, payable at a bank, having taken it up there on the last day of grace, arrested defendant at five o'clock on the same day.
Held, not soon.

Semble, that under the 14 & 15 Vic., ch. 94, sec. 1, he would have been also entitled to sue out his process at any time after three o'clock, had the note been payable generally.

DECLARATION. First count, on a promissory note for £104, made by defendant, one Robert Robson, and indorsed

to the plaintiff, dated 8th of October, 1857, and payable one month after date.

Defendant pleaded that the note was not due or payable at the commencement of the suit.

At the trial, at Toronto, before *Burns, J.*, the note, on being produced, was found to be made payable at the Bank of Toronto; and the plaintiff contended, that being so made payable, it became due after three o'clock on the 11th of November. It was proved that the plaintiff retired the note himself on the 11th of November, at four o'clock in the afternoon, after the notary had protested it at the bank for non-payment. The writ in this action was sued out at five o'clock on the afternoon of that day. The note was discounted at the office of the Commercial Bank, and that bank was the holder when the plaintiff retired it there.

The learned judge reserved leave to move to enter a verdict for the defendant on the first count, if the court should be of opinion that the note was not due when the writ was sued out.

Burns obtained a rule *nisi* accordingly. He cited *Wells v. Giles*, 2 Gale 209; *Hill v. Lott*, 13 U. C. R. 463, 465; *Sard v. Rhodes*, 1 M. & W. 153; *Belshaw v. Bush*, 11 C. B. 191; 14 & 15 Vic., ch. 94, sec. 1; 18 Vic., ch. 10.

McMichael shewed cause, and cited *Leftley v. Mills*, 4 T. R. 170.

ROBINSON, C. J.—On the argument the plaintiff's counsel mentioned a case in this court, of *Cotton and Rowe v. The Windsor Harbour Company*, in which he thought the same point had been decided which is raised here, namely, whether an action can be commenced upon a note before the day after the expiration of the three days' grace. I have looked at my note of that case. It is not at all in point, though it did turn upon the question whether the action had not been brought too soon, for the action was brought upon a sealed instrument, by which the defendants undertook to pay money in twelve months. There could be no question about days of grace. The point raised was whether the

months were to be reckoned as lunar months or calendar months : in other words, a twelve-month.

But I think the statute 14 and 15 Vic., ch. 94, determines this question, where it provides (sec. 1) that all protests of promissory notes for non-payment may be made at any time after three o'clock in the afternoon of the day of dishonour.

The statute 12 Vic., ch. 22, which has been held to apply to Lower Canada only (*a*), allows a bill to be protested for dishonour "in *the afternoon*" of the third day of grace, which is not a very precise expression, though I take it to shew the intention of the legislature that the time for paying the note should be taken to have expired after the hours of business on that day.

But, independently of the statute, I think the plaintiff was entitled to sue out process when he did ; that is, at five o'clock on the evening of the last day of grace, which was after business hours at the bank where the note was made payable. Besides *Leftley v. Mills* (4 T. R. 170), where the judges were divided in opinion upon this point, I refer to the case of *Hartley v. Case* (1 C. & P. 555, 676), and to *Burbridge v. Manners* (3 Camp. 193.) By the express words of the statute 9 & 10 Wm. III., ch. 17, an inland bill of exchange cannot be protested for non-payment until after the expiration of the three days of grace, but as regards promissory notes there is no such enactment. We have therefore to take it upon the authority of adjudged cases, and, when these fail, then upon the reason of things.

As to adjudged cases, the only one that I have found in which the very point which is presented here appears to have been determined, is that of *Wells v. Giles* (2 Gale 209). But that in truth is not exactly in point, for it was on a bill of exchange, and I suppose on an inland bill, in which case it could not be protested for non-payment till after the three days' grace, as I have just mentioned, and therefore could not have been put in suit before, because, according to the statute, the party could not be in default before. This is the case of a promissory note, to which that statute does not apply, but

(a) See *Ridout et al. v. Manning et al.*, 7 U. C. R. 35.

to which our statute 14 and 15 Vic., ch. 94, does apply, which allows it to be protested at any time after three o'clock on the last day of grace; and this, moreover, is a note payable at a bank, which makes this case stronger for holding that, at any rate, even without the statute, the defendant was in fault in not paying it before five o'clock in the afternoon. The defendant engaged to pay it at that place on that day, and if the bank hours were suffered to elapse without his paying it, he certainly was in default, and was therefore, as I think, liable to an action for his default; for he would be liable to the expense of the protest, which the law allows to be made if the note is not paid on that day at the bank; and that charge, if the defendant resisted it, could only be enforced in an action on the bill.

As the case would have stood independently of our statute, Lord *Kenyon*, it appears from his judgment in *Leftley v. Mills*, would have held that the plaintiff in this case was not at liberty to sue till after the three days of grace had wholly expired, while it seems as clear that Mr. Justice *Buller* would have held otherwise, and Mr. Justice *Grose*, as the case went off upon other ground, declined expressing an opinion on the point on which the other two judges differed. It is only, however, on account of the language used by the judges in their reasoning upon the case, that *Leftley v. Mills* has any material bearing on this case, because that was an inland bill, in which case the statute 9 & 10 W. III., ch. 17, leaves no room for question that the cause of action cannot be complete until the day after the three days of grace. I think the plaintiff in this case could commence his action at five o'clock on the evening of the third day of grace: *first*, by reason of the provision in our statute 14 & 15 Vic., ch. 94; *secondly*, because this note being made payable by defendant at a bank, defendant was in default when the banking hours were passed, and the bank shut, and the defendant had not paid it, though the plaintiff on that day had attended and demanded payment.

This point has been nowhere so extensively discussed as in a note to Story on Promissory Notes, 4th Ed. sec. 225, *a*, where every authority upon the case, both English and American,

seems to have been cited. So far as I can find, it may still be said, as it is said in that work, that no express English authority can be cited upon the point, whether an action can or can not be brought on a promissory note after demand made upon the last day of grace, and the note dishonoured. In the American courts there have been numerous decisions that the action may be brought on the last day, and I think reason is with those decisions. Mr Chitty, in his treatise on bills (9th Ed. pages 397, 481) while he treats the case in point as one not expressly decided in any English adjudged case, is inclined evidently to the conclusion which Mr. Justice *Story* has come to in sec. 225 *a* of his work: namely, that when a note has been made payable at a banker's, and remains unpaid when the bank closes, it is the same as if the maker had refused to pay, and that in such a case an action will lie on that day. I think our statute fortifies that conclusion; and that the defendant's rule for entering a verdict in his favour on the first count must be discharged.

MCLEAN, J.—By 14 & 15 Vic., ch. 94, sec. 1, a promissory note may be protested on the day of its dishonour at any time after three o'clock, and notice must be sent to any indorser on the same day, or the next judicial day, or the indorser will be discharged.

By the 18th Vic., ch. 10, it is provided that whenever the day which would otherwise be the last day of grace for the payment of any bill of exchange or promissory note shall fall on a Sunday, legal holiday, or any of the days mentioned in 12 Vic., ch. 22, sec. 26, as being a holiday at the place where the same is payable in Upper or Lower Canada respectively, such bill or note shall be *payable*, and the days of grace shall expire, on the day next thereafter, which shall not be a Sunday or holiday, and not before. If a note is payable on a particular day at a bank, it must be paid before three o'clock, or it becomes dishonoured, and may be protested immediately after that hour. If *payable before* or at *three o'clock* it must be *due* at that time, and any note which is *over due* may be sued. The defendant's note became due at three o'clock: it was not paid, and the plaintiff was at

liberty to proceed by summons or by arrest for the collection of the amount.

BURNS, J., concurred.

Rule discharged.

HILL v. MCKINNON.

Rectory—Statute of Limitations—Rector when barred—Effect of statute against grantee of Crown—Notice of title in ejectment—C. L. P. A. sec. 222.

A rector is not barred by adverse possession of the glebe land for twenty years unless he has been incumbent during the whole of that time.

Quære, per *Robinson*, C. J., whether, when the Crown grants lands of which another is in possession, and continues in possession twenty years, the grantee who has never been in possession is barred.

Where a defendant in ejectment, by his notice, besides denying the plaintiff's title, claimed to hold under a lease. *Semble*, that he was entitled to shew an adverse possession by himself for twenty years in order to defeat the plaintiff's claim, although the effect might be to establish a title in himself of which he had given no notice.

EJECTMENT for lot No. 19 in the 9th concession of Vaughan.

At the trial at Toronto, before *Draper*, C. J., it appeared that on the 21st of January, 1856, the Crown granted letters patent, by which it was declared that his Majesty thereby set apart this lot as a glebe and endowment, to be held appurtenant to the parsonage or rectory of the township of Markham created by the same letters patent.

Admission, institution, and induction of the plaintiff as rector were proved. The induction took place on the 13th of September, 1850. This formed the plaintiff's title.

The defendant had given notice with his appearance, as is required by the Common Law Procedure Act, in which he stated that he denied the plaintiff's title, and asserted title in himself "under a transfer of a lease granted to John Frank, by the Crown, which lease was granted in the manner ordinarily employed in such cases; to wit, by the insertion of the said Frank's name in the books of the clergy reserve land office."

The defendant called a witness, who proved that the defendant had made a small improvement in 1834 and 1835, and, as the witness believed, had occupied a house upon the land, and occupied the property ever since, either by himself or his tenants. He said that between five and ten acres of the land were cleared, in or before 1836. There were at the

time of the trial about 100 acres cleared. The defendant still occupied the lot.

This evidence was uncontradicted. The learned Chief Justice considered that the defendant could not, considering the terms of his notice, give evidence of such a possession in himself as entitled him to a verdict under the statute of limitations; and, moreover, that the legal title to the land was in the Crown all the time, notwithstanding the letters patent that had been issued; but he directed the jury to find what portion of the lot the defendant had held actual possession of for twenty years before this action was brought, and reserved leave to the defendant to move to restrain the verdict by excluding such a portion.

A verdict was accordingly rendered for the plaintiff, and the jury found that the defendant had been in actual possession of ten acres for twenty years next before the action.

Eccles, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, or to confine the plaintiff's verdict to the land not found by the jury to have been occupied by the defendant for twenty years.

M. R. Vankoughnet shewed cause, and cited *Runcorn v. Doe* *deft.* Cooper, 5 B. & C. 696; *Barker v. Richardson*, 4 B. & Al. 579; *Croft v. Howel*, Plow. 538, 375.

ROBINSON, C. J.—I do not so construe the Common Law Procedure Act, secs. 222, 224, as to hold that the defendant was in this case precluded, by the notice he had given of the nature of his title, from objecting that the plaintiff had lost his title by allowing himself to be dispossessed for twenty years. The effect of that, no doubt, in some cases, might be to shew, not only that the plaintiff is barred by the statute of limitations, but also that the defendant has acquired what has been called a parliamentary title to the property. That may or may not be the effect, according to the facts of the particular case, which may sometimes shew that the defendant is entitled to have the twenty years' possession enure to his benefit, but sometimes that is not the case. Here the very possession spoken of by the witnesses seems to have been a possession held by the defendant him

self or his tenants, and if this case were one to which the statute of limitations could apply, the defendant would seem to have proved a title in himself, at the same time that he shewed the plaintiff to have been dispossessed for twenty years.

But that is of no consequence to him so far as this action is concerned. Being defendant in the suit, all that is necessary to his success is to shew that the plaintiff cannot recover, and I think, under the statute and the notice given by him, he is at liberty to do that, by way of denying or repelling the plaintiff's title, although (if it were necessary to his purpose) he could not rely upon it by way of setting up a title in himself, because such a title would be one of a different nature from that of which he had given notice.

But I am of opinion that this rule must be discharged and the plaintiff's verdict be allowed to stand for the whole lot, on the ground taken by Mr. Vankoughnet on the argument, and supported by the authorities cited, of *Plowden* 375, 538; *Runcorn v. Doe dem. Cooper* (5 B. & C. 696), and *Barker v. Richardson* (4 B. & Al. 579), that when there has been a succession of incumbents of a rectory the statute cannot bar, since the laches of the former rector cannot prejudice his successor. He was only entitled to hold during his incumbency, and could not alienate the fee, however he might affect his own right of entry or action by allowing himself to be dispossessed for twenty years. This ground seems clear against the objection to the plaintiff's recovery for the ten acres of which the jury found that the defendant had been more than twenty years in possession.

If, as seemed to be thought by the learned judge at the trial, the legal title of the Crown to the land was not divested by the patent that had been issued for erecting and endowing the rectory, then of course the statute could not have run, at any rate; but on that point I do not at present give any opinion, nor upon another point which has suggested itself to me—namely, whether in a case in which the Crown makes a grant to one person of land of which another is at the time in possession, and continues in possession for twenty years, the right of the grantee, who has never been

in possession in respect of his estate, and who consequently can never have been dispossessed, can be held to be barred under the 16th and 17th clauses of our statute 4 Wm. IV., ch. 1.

Upon the main ground, that the statute does not run where there has been a succession of incumbents within twenty years, I am of opinion that the rule must be discharged. I refer to Plowden 538, 375 note; 4 B. & Al. 579; 5 B. & C. 696; Stark Ev. III. 913.

BURNS, J.—It is not necessary to enquire whether the defendant could or could not give evidence of twenty years' possession under the notice which he gave the plaintiff, in order to defeat the plaintiff's right of action. Where the nature of the evidence offered by the defendant is for the purpose of making invalid a deed through which the plaintiff claims, or for the purpose of disputing some other point in the plaintiff's case—as, for instance, if the claim be as heir at law, and the evidence be to prove that some other person is the heir, or the like—I can very well understand that the defendant is at liberty to give the evidence under a notice similar to that given in this case. I think it may admit of question, however, whether the defendant is at liberty to prove himself in possession for twenty years adversely to the plaintiff's claim, with a view of destroying the plaintiff's title, for that amounts to title in himself.

Independent of this question, it is quite clear the defendant was not in a position to set up the statute of limitations at all. This plaintiff was presented and inducted in 1850, and it was then only that his right accrued, and defendant's previous possession cannot count as against him. Plowden, in his note to *Stowel v. Lord Zouch* (375) says, "And if the law should be taken for certain, that upon a fine levied by the predecessor of a bishop, dean, prebendary, or parson, and proclamations made, or that upon a disseizin done to a bishop, dean, or prebendary, and such others, their successors shall be bound by a feoffment of the termors or otherwise, and by a fine afterwards levied, and by non-claim of the bishop, dean, or such other, for five years, this would soon

grow into great practice, and thereby holy church would lose more possessions than it could gain in these days."

Then the case of Runcorn against Doe on the demise of Cooper, in Error, (5 B. & C. 696) decides the point, that the twenty years must run against the same incumbent, and when that is the case the defendant would be in a position to resist any action brought against him by that incumbent, but the successor of the incumbent would not be bound. On this ground the rule must be discharged.

McLEAN, J., concurred.

Rule discharged.

PLUMER ET AL. V. SIMONTON.

Bond to convey land—Measure of damages.

In an action on a bond to convey land within a certain time, where defendant's inability arose from his having neglected to do the settlement duties, and take out the patent—*Held*, that the plaintiffs' damages were not confined to the purchase money paid and interest.

DEBT on bond, dated the 13th of February, 1854, in a penalty of £200, with condition that defendant should within three years, convey by a good title to the plaintiffs the north-east half of lot No. 16 in the second concession of Howard, charging as the breach that defendant did not, within the three years, convey, &c.

Plea, *non est factum*.

At the trial, at Chatham, before *McLean*, J., it was proved that the plaintiffs paid £75 for the land, which was the whole consideration. The land was subject to the settlement duties, and patent fees, and the defendant not having done the settlement duties and paid the fees, had not obtained his patent, and so could not convey, though, as it would seem from the evidence, this could only be ascribed to his own neglect.

The question was whether, under such circumstances, the plaintiffs could only recover the price paid for the land, and interest, or whether defendant should be made to pay what the land was worth at the time it ought to have been conveyed.

Some witnesses valued the land at £200, others at £100,

or less, and another swore that he thought the plaintiffs had paid as much for the land as it was worth.

The jury gave a verdict for £160, and the learned judge reserved leave to the defendant to move to have the verdict reduced to the £75 paid by the plaintiffs and the interest.

Becher obtained a rule *nisi* accordingly. He cited *Add. Con.* 1142; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 B. & C. 416; *Sug. V. & P.* 1097.

Duck shewed cause, and cited *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Harman*, 1 Ex. 856; *Hurst v. Hurst*, 4 Ex. 571; *Mayne on Damages*, 93; *Bitner v. Brough*, 11 Penn. Rep. 127; *Vallier v. Walsh*, 6 C. P. 459.

ROBINSON, C. J.—We think the plaintiffs' damages are not necessarily restricted to the £75 paid by them, and interest. This case is very different from *Flureau v. Thornhill* (2 W. Bl. 1078) and that class of cases, and from *McKinnon v. Burrows*, decided in this court (3 O. S. 590). It is not that the plaintiffs have been disappointed in their purchase by a defect discovered in the title, of which the vendor was not aware when he sold, and which it was out of his power to overcome. The condition of the defendant's bond shews, by reasonable construction, that it rested with the defendant to do the settlement duties on the land, without which the patent could not be obtained, for he was to convey as soon as he obtained the patent, and at all events within three years. If the plaintiffs had engaged to do the settlement duty, then the time when the patent could be obtained would have depended on them, and the defendant would hardly have bound himself absolutely to make a title in three years. For all that appears, then, it rested with the defendant to do what required to be done before the patent issued; and if so, then the non-performance of the settlement duties is not an excuse that can be set up by him, and he stands in no better situation than if he were to say, "The three years are out, but I do not choose to make a deed."

In any case, where the vendor refuses or neglects to make a title, when it is in his power, or when he knew, at the time of his entering into the covenant, that there was a fatal defect in his title, I take the law to be that the damages are

not limited to the purchase money, or the deposit which the vendee has paid. And this is a stronger case in favour of the plaintiffs, because here the defendant has bound himself in a penalty, from which it lies upon him to relieve himself, by taking advantage of the defeasance, and performing the condition.

In my opinion the rule *nisi* must be discharged.

BURNS, J.—There are two classes of cases in which the law seems well-settled, that a plaintiff is only entitled to recover back his money and interest, by way of damages, where there has been no fraud practised, and the value of improvements, or loss as for a good bargain, cannot be recovered. *First*, where an estate has been conveyed, and the action is brought for want of good title or right to alien. The reason for that is, that the estate is handed over on the one side, and the value or consideration is handed over on the other side : both parties then fix the value or price, and the relation of the covenant for title is to that time, and not to a time when something may happen or occur to change that value at any future period ; and if the parties deal with each other in good faith, the measure of damages has been held to be confined to the price or value then put upon the estate by the parties, and interest upon it : that is the extent which ought to be recovered, though in some cases a jury may perhaps give less. The case of *McKinnon v. Burrows* (3 O. S. 591), in our own court, and cases there mentioned, are of that description.

Secondly, another class of cases is where the parties have not yet perfected the agreement by the conveyance of the estate, but there is a bargain, on the one side to convey, and on the other to pay when title made perfect, with perhaps a deposit made, or even the whole purchase money paid, and an investigation of title takes place. There being no fraud in the case, when the party is unable to make a good title all that can be recovered back is the amount paid, with interest, and expenses of investigating the title. No loss of good bargain, or for anything which the other party could have been shewn to have made upon a re-sale in the meantime can be considered. The cases of *Walker v. Moore* (10 B. &

C. 416), *Tyrer v. King* (2 Car. & K. 149), and the more recent case of *Pounsett v. Fuller* (17 C. B. 660), are of this description.

The present case is of a different kind. Here the defendant binds himself by bond, in a penalty, that he will, within three years, execute a conveyance of the land to the plaintiff. So soon, therefore, as he forfeited his bond, by not making the conveyance within the stipulated time, it became single; and formerly the whole penalty would have been recoverable at law as a debt, but now the defendant would be liable in damages to the extent of the penalty. If the condition had been for the payment of money, then indeed no more than the amount, interest and costs, could be recovered; but that is by virtue of the statute 4 and 5 Anne, ch. 16. The defendant contends in this case that the same principle should govern, because no more would be directed to be given in the two classes of cases I have mentioned. The difference between the present case and such a principle to be applied is, that here the defendant contracts under a penalty to do a certain thing within a certain time, and does not do it, and therefore the principle of the common law would prevail—that the penalty would be recoverable as the debt—unless that be governed by the equitable principle that damages should only be given equivalent to the injury sustained. The case of *Flureau v. Thornhill* (2 W. Bl. 1078) qualified the common law in the case of contracts for the sale of lands, because, as expressed by Mr. Justice Blackstone, these contracts are merely upon the condition, frequently expressed but always implied, that the vendor has a good title. In this case the bond is not a contract of sale, with any condition of that kind, either expressed or implied, but is a positive engagement that the defendant will convey the land to the plaintiff, and therefore comes within the principles established by the cases of *Hopkins v. Grazebrook* (6 B. & C. 31), *Robinson v. Harman* (1 Ex. 850), and the recent case of *Vallier v. Walsh* (6 C. P. 459).

The rule for reducing the damages should therefore be discharged.

McLEAN, J., concurred.

Rule discharged.

STEWART v MURPHY.

4 Wm. ch. 1, sec. 17—*Construction of—Possession by grantee before patent.*

The possession of land by a person deriving title from the Crown, which under the 4 Wm. IV., ch. 1, sec 17, will enable the statute to run against him, must be a possession *after the patent has issued*.

In this case, B. went upon the land for the purpose of performing the settlement duty, and conveyed to H. (from whom the plaintiff claimed) : he then left the country, and the patent was afterwards issued in his name. After B. left defendant took possession, and had continued more than twenty years, but there was no evidence that B., while patentee, knew of his being there. *Held*, that the plaintiff was not barred.

Quære whether B.'s occupation, merely for the purpose of performing settlement duty, would have been sufficient, even after the patent, to deprive him of the benefit of the statute.

EJECTMENT, for lot No. 4 in the ninth concession of Leeds.

At the trial, at Brockville, before *Robinson C. J.*, the plaintiff proved a patent issued to John Bawdin for this land on the 21st of June, 1824; and a deed was produced, dated the 8th of August, 1822, from John W. Bawdin to Edward Harrison, conveying this land to him for £50, with covenants for title, quiet enjoyment, &c. There were two subscribing witnesses to this deed, who were both dead, as proved by David Jones, Esquire, in whose handwriting the deed (a printed form) was filled up. On the 15th of September, 1857, Edward Harrison conveyed this land to the plaintiff, for a consideration expressed of £5.

The facts of the case were singular. There seemed, upon the evidence, no reason to doubt that John Bawdin, mentioned in the patent, was the John W. Bawdin who made the deed to Harrison. It was proved that John W. Bawdin lived in Brockville from 1818 to 1822, when he left Canada, and nothing more was known of him. He had been in partnership with Harrison, and when they separated Harrison had a demand against him for about £40, which he employed David Jones, Esquire, an attorney, to collect; and, as Harrison swore, who was examined as a witness upon this trial, he was paid the debt in money by his attorney, Mr. Jones.

Mr. Jones had no recollection, as he stated, of the transaction, and Harrison stated that he had never seen the deed till lately, and had no recollection of any such conveyance having been made to him, but he said he had no doubt it was all right. It seems probable, from the evidence, that

Mr. Jones knowing that the lot belonged to Bawdin, had got him to give a deed of it in order that he might be secure in waiting for payment, and that Mr. Jones afterwards settled the debt. His docket, he said, might explain how it was, but he was called suddenly to give evidence without being requested to make the search, and he could give no explanation of the matter.

Harrison swore that he had some recollection that the land was sold under his execution against Bawdin; and it was asserted, but not proved, that it was bought at the sheriff's sale by one McKenzie, who sold it, and that the title came to this plaintiff, who discovering afterwards that a deed had been made of it by Bawdin to Harrison, referred to Harrison about it, who, at his request, gave him a conveyance of all his estate in the land, upon receiving £5, which Harrison said was about the amount of a small balance that appeared by his books to be yet unpaid of his debt against Bawdin. The deed to Harrison had never been registered.

The defendant set up no other title to the land than by possession.

The learned Chief Justice told the jury, that, though the deed to Harrison was made before the patent issued, the conveyance might operate by estoppel, which would work in interest, as soon as the patent issued, to Harrison, to whom the patentee had given the deed; and that, if they were satisfied of the identity of the person, J. W. Bawdin's deed would convey the fee to Harrison, and the plaintiff's title was sufficiently made out, provided they had no doubt that the deed was actually executed, and without fraud or imposition.

As to the possession, there was evidence that before Bawdin left Canada in 1822, he had gone upon the lot, and done the settlement duty, though there was a doubt upon all the testimony whether that was Bawdin or one Armstrong, who, according to other accounts, was employed to do the settlement duty for Bawdin, and did it, and was paid for it. There was no doubt that after Bawdin left Canada (in 1822), and much more than twenty years ago, the defendant went upon the land (not under any colour or right) and cleared some acres, and had lived on it continually

since. The waters of the Rideau divide the lot. On the north side the land was wet, and was still in a state of nature, not having been occupied by the defendant, or by any one. The defendant's improvement was altogether on the south side, and the evidence was very vague and unsatisfactory as to the extent of his improvements, for he owned the lot adjoining, and the witnesses could not tell how much of the cleared land was on this lot, and how much on the other.

The learned Chief Justice told the jury, that the defendant's possession would only bar the plaintiff as regarded that part of the lot of which he held actual possession, not that part which he had not enclosed, or visibly used during the time, so that it could be said he was in exclusive possession of it. And as to the operation of the 17th clause of our statute, 4 Wm. IV., ch. 1, in this case, he explained that if they were satisfied Bawdin had lived on the lot for a time, while, according to some portion of the testimony, he was doing the settlement duty, then, having been on that occasion in actual possession of this land granted to him by the Crown, the statute would, but for one circumstance, clearly begin to run against him when the defendant went upon a part of the land more than twenty years ago; but as it seemed that such actual possession of Bawdin was not under his patent, but before any patent had issued, he inclined to think the case did not come under that part of the 17th clause which dispenses with the necessity of proving knowledge on the part of the patentee of the possession held against him before the statute can begin to run.

The jury, however, found a verdict for the plaintiff, for such part of the land only as the defendant was not in actual possession of, adding that they were unable to say from the evidence what particular portion that was.

Sherwood, Q. C., obtained a rule *nisi* for a new trial, to which *Richards* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The case is a peculiar one, and brings up a new point. That the defendant had been for more than twenty years

in actual visible possession (though without right) of a considerable portion of the lot in question, is quite clear upon the evidence, and it is clear also that such possession has been held by him for much more than twenty years since the patent issued to Bawdin for the lot.

We have then to consider the effect of the 17th clause of the 4 Wm. IV., ch. 1, in this case, which provides "that until the person *deriving title to land in this province as the grantee of the Crown*, or his heirs or assigns, or some or one of them, by themselves, their servants or agents, shall have taken actual possession of the land granted, by *residing thereupon*, or by cultivating some portion thereof, the lapse of twenty years shall not bar the right of such grantee or any person claiming by, under, or through him, to bring an action for the recovery of such lands, unless it can be shewn that such grantee, or person claiming by, under or through him, while entitled to the land, had knowledge of the same being in the actual possession of some other person not claiming to hold by, from, or under the grantee of the Crown (such possession having been taken while the said lot was in a state of nature), in which case the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained."

Now admitting that the occupation between 1820 and 1822 by Armstrong, if he was sent by Bawdin to do the settlement duty, would be the same thing as an occupation by Bawdin himself, and admitting also, which I should think more doubtful, that an occupation of that kind—that is, for the purpose merely of doing the settlement duty upon the lot—would be such a residing upon the land as would be sufficient to exclude the grantee from the benefit of the exception contained in the provision referred to, I thought at the trial that the possession of a person deriving title from the Crown, which will have the effect of enabling the statute to run against him, though he might be ignorant of the fact of a subsequent possession being held against him, must be a residence, or cultivation of some portion of the land by him, after he has become *the grantee of the Crown*, in the legal sense of that term; in other words, after the

patent has issued to him. Now that was not the case here : whether it was Bawdin himself that did the settlement duty between 1820 and 1822, or Armstrong for him, that was unquestionably before the patent issued, and Bawdin had left the country before he obtained his patent, and there was no evidence whatever that Bawdin, at any time after the patent issued, had notice or knowledge of the defendant having entered upon the land.

If this construction of the statute be the correct one, which we think it is, then it was necessary to shew knowledge by Bawdin, or some one claiming under him after the 21st of June, 1824, when the patent issued, that the defendant Murphy had gone upon the land, and there was no proof of that, which was necessary to be shewn before the statute could begin to run.

In our opinion, therefore, there should be a new trial without costs.

Rule absolute.

WATSON v. THE SARNIA PLANK ROAD COMPANY.

The lessee of a road from a joint stock road company cannot maintain any action against the lessors for neglecting to keep their road in repair, and thus causing a diminution in the tolls, for, in the absence of any covenant in the lease, no such duty arises from the relation of landlord and tenant.

The 34th and two subsequent sections of 16 Vic., ch. 190, are intended for the protection of the public, and do not give any additional rights to a lessee of the road.

The plaintiff stated in his declaration, that he had leased from the defendants the Sarnia plank road, from the 18th of May, 1856, to the 30th of April, 1857, for £408 a year : that the defendants were and are a joint stock company, existing under the provisions of the statute 16 Vic., ch. 190, for the formation of joint stock companies for the construction of roads and other public works in Upper Canada : that it was the duty of the defendants to keep the road in good and sufficient repair : that they neglected that duty, and suffered the road to decay, and become wholly out of repair, from the 1st of July, 1857, to the end of that year, of which the plaintiff gave them notice, whereby the road became

dangerous and unfit for travel, in consequence of which the tolls greatly decreased, and the plaintiff lost a large amount, &c.

Defendants pleaded 1st. Not guilty.

2nd. That the plaintiff was not the lessee, as alleged.

3rd. That the tolls did not fall off by reason of the road being out of repair.

4th. That they were not duly notified that the road was out of repair.

At the trial, at Sarnia, before *McLean, J.*, there was a good deal of evidence to prove that the road during the year 1857, after the lease to the plaintiff, was out of repair.

It passed over wet ground, and from that cause chiefly seemed to have been in a bad state, so that the people avoided using it, and went round by another road, which the witnesses ascribed partly to the plank road being out of repair, and partly to their desire to avoid paying tolls.

The learned judge doubted whether this action could be maintained. He thought the statute prescribed how the duty to keep the road in repair should be enforced, and that *every one* suffering from the omission could not sue the company, but he requested the jury to find what damage the plaintiff had sustained, and reserved leave to the defendants to move for a nonsuit.

The jury found for the plaintiff and £34 damages, on the first, second, and third issues, and for the defendants on the fourth.

M. C. Cameron obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved, or for a new trial on the law and evidence, or to arrest the judgment.

Becher, Q. C., shewed cause.

ROBINSON, C. J.—The effect of the finding for the defendants on the fourth plea is to be considered.

The lease seems not to have been produced at the trial.

The motion in arrest of judgment did not appear to be insisted on by the defendants in the argument. The plaintiff's counsel stated that he understood the objection to be the want of averment that notice had been given to the

company of the road being out of repair, as provided in the 34th section of the statute 16 Vic., ch. 190, in order to establish that the company and the lessee had in consequence lost the right to receive toll until the road should be placed in a proper state of repair. The intention of the 34th, and two following sections of the act is to protect the public against the necessity of paying tolls in such cases. The provision has not, in my opinion, any bearing upon the relation between the company and their lessee, as landlord and tenant, any further than that, if the company had brought themselves within it by neglecting to repair after notice, then the lessee might have founded his action upon his absolute inability to receive tolls. Whether that could be made a ground of action on his part for damages, or might be set up in bar of any claim for rent, we need not now consider, because the plaintiff has not in his action placed that question before us. He is neither resisting the company's claim for rent, nor is he in this action founding his complaint upon any alleged disability of the company or himself to charge toll, in consequence of any notice having been served under the 34th clause. He has by his declaration rested his case on no such ground, for he has not averred notice given by the engineer to the head of the company, under the 34th clause, nor any consequent legal incapacity in the company to charge toll. He cannot be considered as grounding his action upon any peculiar duty thrown upon the company by those provisions in the statute, since he has not averred what it would be necessary to shew in order to make that duty attach.

He sues the defendants for damages in consequence of the diminution in amount of tolls, not because he had lost the power to charge, but because many people avoid the road in consequence of its being in bad repair, and he does not therefore receive so much income as he otherwise would. This leaves the case to rest upon the mere relation of landlord and tenant, and the duties arising from it. Upon that ground the action is not maintainable. If the lease, which was not produced at the trial, had contained any covenant by the company to keep the road in repair, the action must

of course have been grounded upon the covenant. Where there is no such covenant, which I assume to be the case in this instance, no action lies by the tenant against his landlord for not repairing. Even where a house is leased, and for want of repairs it becomes uninhabitable, no such action lies, in the absence of an engagement by the landlord to repair. The parties have referred the question to the court, whether upon the facts proved any action lies, agreeing that a non-suit may be entered if it does not. In my opinion a non-suit should be entered, though, if we were strictly to compare the evidence with the verdict found upon the several issues, I am not prepared to say that the plaintiff did not entitle himself to a verdict upon all.

The only one about which there could be any doubt would be the fourth, and as that refers only to a notice by the plaintiff of the want of repair, not to a notice such as is required by the 34th clause of the act, and as there is some evidence of the plaintiff having given notice of the bad state of the road, though not formally, it is not clear that the jury should not have found for the plaintiff on that as well as upon the other issues; but they found for the defendants, which bars the action, and the plaintiff has made no motion for judgment *non obstante*, so that, there being in truth no legal cause of action, nothing is lost by the parties having agreed to let the case be decided upon a motion for non-suit.

BURNS, J.—The plaintiff has altogether mistaken the effect of the 34th section of the statute 16 Vic. ch. 190, in supposing that it applies against these defendants, so as to give him a right of action as the gate-keeper, because the amount of toll was lessened by reason of the road being in a bad state of repair. The obligation imposed upon the road company is for the protection of the public, and if the plaintiff had suffered by reason of having a waggon broken, or a horse injured, he would have a good cause of action against the company; but the legislature never intended to alter the law, and impose an obligation upon the defendants, as landlords, to the plaintiff, as their tenant, that they should repair the road in order that it might be more profitable to him.

If the plaintiff desired to protect himself against payment of the rent for the road or gates in case of diminution of the tolls, he should have stipulated for it by way of reduction, or have had the defendants' covenant to him to keep the road in repair, so that he might have a remedy against them in case they did not. The case of *Hart v. Windsor* (12 M. & W. 68) shews that the only implied contract or covenant between the landlord and tenant is that of title, and that there is no implied contract as to the condition of the property at the time of the lease of it, or that it shall continue fit for the purpose for which it was demised.

McLEAN, J., concurred.

Rule absolute for nonsuit.

WASHINGTON V. WEBB.

Division Court—Interpleader—Action against bailiff for seizure—Application to stay proceedings—Laches—13 & 14 Vic., ch. 53, sec. 102; 16 Vic., ch. 177, sec. 7—Construction of.

The plaintiff, in November, 1856, sued defendant, a bailiff of a division court, in trespass for seizing his goods; defendant, thereupon, in February, 1857, obtained a summons in this court, calling on the plaintiff to shew cause why the action should not be stayed, and why the judge issuing the summons should not adjudicate upon the plaintiff's claim. When this summons was obtained, an interpleader order was pending in the Division Court, which the judge of that court determined in March, by deciding that the plaintiff was entitled to the proceeds of the goods sold, and £15 as damages for taking them, which the execution plaintiff then paid into the Division Court. In the meantime, however, the summons in this court had been discharged; and afterwards the plaintiff proceeded with this action by filing a declaration in August, to which the defendant pleaded; and a trial took place, which resulted in a verdict for the plaintiff. The defendant then applied to rescind the order discharging the summons in this court, and to stay proceedings.

Held, that the summons should not have been discharged altogether, but proceedings should have been stayed, as directed by the 16 Vic., ch. 177, sec. 7; and that the defendant was still entitled to a stay of proceedings, under the statute, notwithstanding his laches; but on account of his delay the rule was made absolute, without costs.

Under the 13 & 14 Vic., ch. 53, sec. 102, and 16 Vic., ch. 177, sec. 7, amending it, the judge of the division court must adjudicate upon the claim to goods seized; but the application to stay proceeding in any action brought for the seizure must be made to the court, or a judge of the court, in which such action is pending.

Crooks, during this term, obtained a rule, which had been moved for in Michaelmas term last, on the part of the defendant, calling on the plaintiff to shew cause why the order of the Honourable Mr. Justice *McLean*, discharging the sum-

mons issued in this cause, calling on the plaintiff to shew cause why all further proceedings in this cause should not be stayed, should not be rescinded; and why it should not be referred to the judge who granted the summons to adjudicate upon the claims upon which the action is brought, and why the judge should not make such order, in respect thereof, and of the costs of the proceedings, as should seem meet; or why a rule of court should not issue, in similar terms to that set forth in the summons.

On the 7th of February, 1857, the defendant obtained a summons from Mr. Justice *Burns*, calling on the plaintiff to shew cause why all further proceedings in the case should not be stayed, and why it should not be referred to the judge to adjudicate upon the claim on which the action was brought, and why the judge should not make such order between the parties in respect thereof, and of the costs of the proceedings, as to him should seem fit. This summons was obtained upon an affidavit of the defendant, shewing that he was the bailiff of the seventh division court of the county of Wellington, and as such had, previous to the 5th of September, 1856, a warrant of execution in his hands against the goods of Daniel Youbanks, at the suit of one Garrett Molloy, and upon it had sold, as the property of Youbanks, one yoke of oxen, one chain, and a lumber waggon, and had paid the proceeds thereof into the hands of the clerk of the court. The present plaintiff claimed the property, and on the 5th of September, 1856, served the defendant with notice of action, and thereupon the defendant obtained from the clerk of the court an interpleader summons, and called both the plaintiff and Garret Molloy to appear before the judge of the Division Court, and support their claims to the proceeds arising from the sale of the goods and chattels. They did appear accordingly, and the hearing was postponed or adjourned from time to time, and on the 29th of January, 1857, the matter had not been determined, and the proceeds of the sale still remained in court. On that day, the 29th of January, the defendant was served with a writ in this action, which writ had been issued on the 24th of November,

1856, and then the defendant applied for and obtained the summons to stay the action.

The summons was heard on the 7th of March, 1857, before Mr. Justice *McLean*, and he made an order discharging the summons, with costs to be costs in the cause.

On the 17th of March, 1857, the interpleader summons was heard, and judgment given thereon by the judge of the county court. The plaintiff appeared and claimed the proceeds of the sale of the goods, and the judgment creditor appeared to dispute his claim. The judge of the county court ordered the proceeds, after hearing the parties upon their respective claims, to be paid to the plaintiff—namely, £11 15s.—and upon asking the plaintiff whether he claimed damages for the seizure, and being answered that he did, the judge thereupon awarded the further sum of £15, to be paid by the execution creditor, Garrett Molloy, to the plaintiff. That sum of £15 was paid into court, and both sums still remained in court, the plaintiff not having taken them.

M. C. Cameron shewed cause. It appeared that subsequent to the proceedings before the judge of the county court the plaintiff had, on the 22nd of August, 1857, filed a declaration in this cause: that on the 29th of August the defendant pleaded; and the case was tried at the last assizes held at Guelph, before *Burns, J.*, and a verdict rendered for the plaintiff for £38.

Hector Cameron supported the rule.

ROBINSON, C. J.—I confess I am rather at a loss to give a clear construction to the seventh section of the 16 Vic., ch 177, and cannot altogether satisfy myself as to the extent to which the 102nd clause of the 13 & 14 Vic., ch. 53, is altered in effect by the 7th clause of the later act, which is not substituted for it, but must be read in connexion with it. I think, however, that the legislature must have meant that the claim in interpleader cases, mentioned in the seventh clause, must be adjudicated upon in *the division court* which issued the summons, though it is remarkable how the language, as to that portion of the clause, varies from that used in the 102nd

clause of the former statute, and how much less explicit it is upon that point. Still I cannot imagine how anything else was meant.

Then, as to the court in which the application should be made to stay the proceedings in any action brought, I take it the superior court, in which the action is pending, must be meant, or a judge thereof. There can surely be no room for doubt on that point.

Then assuming this to be so, any delay in making the application for the interpleader order in the division court was a matter to be excepted to before the judge of that court. Having made the order, and adjudicated upon the case, his decision must have effect given to it, so far as he had authority under the statute to do what he did.

When the judge of this court was moved in February, 1857, to stay proceedings in this action, *and to adjudicate upon the claim*, I do not see why he should not have acceded to that part of the application which related to the staying proceedings in this action, though I think he properly refused to adjudicate upon the claim, because there was a proceeding pending in the division court, and intended, as I understand the act, to be adjudicated upon there. Mr. Justice *McLean*, however, seems to have discharged the summons altogether on the 7th of March, 1857, and if the defendant did not mean to acquiesce in that decision, I do not see why he should not have moved this court upon the subject before Michaelmas Term last, allowing two terms to elapse.

It is objected that the defendant also pleaded to this action after his summons to stay proceedings was discharged, and now, after the verdict upon the issues raised by his pleas, he comes to the court (in Michaelmas Term) to stay proceedings. Any delay, however, in moving cannot warrant us in disregarding the act of parliament, but it may influence us in regard to costs.

I agree that the order should be made absolute to stay proceedings in this action without costs: not giving any costs to defendant, because he incurred them unnecessarily by pleading to the declaration. He could have come to this court in Easter or Trinity Term as well as now.

BURNS, J.—This application is made under the 7th section of 16 Vic., ch. 177, and it appears that the defendant, upon being notified that the plaintiff claimed the property which he had sold upon the warrant of execution, promptly applied under that section for a summons, calling before the division court the execution creditor and the plaintiff. He did not wait for a writ to be issued, but obtained the interpleader summons on the 2nd of October, 1856, summoning the parties to appear on the 11th of November, at which time, it seems, the hearing of the matter was adjourned. Why the plaintiff after this should have sued out a writ does not appear, but, when it was served upon the defendant, he again promptly applied to a judge of the court to stay the action. The section of the act is obscurely worded, but I take the meaning of it to be this: that when the action is brought in the superior court, it is that court, or a judge thereof, who has the authority to stay the proceedings, and that authority extends to make the party plaintiff pay costs, if the action be brought after the summons for interpleading shall have issued from the division court; but that it is the judge of the division court who shall adjudicate upon the claim, and make such order in respect of such claim, and the costs of the proceedings, as to him shall seem fit, and his order is to be enforced in like manner as any order made in any suit in such court, and such order shall be final and conclusive between the parties.

Instead of the summons being discharged, as it was, it should have been made absolute. The only question now is, whether the defendant be too late in this application, having allowed two full terms to elapse before applying to rescind the order made on the 7th of March, 1857, and in the mean time having pleaded to the declaration, and having defended the case at the assizes. I do not think he is too late in still asking the court to stay the action. There can be no doubt the judge of the county court had full jurisdiction over the plaintiff's claim, and in that respect the plaintiff is in error in asking by this rule that the judge of this court who issued the summons should adjudicate upon the claim. At the time the summons to stay proceedings was discharged, the judge

of the county court had not as yet disposed of the matter. He did afterwards do so, and made an order, which has passed into judgment for the plaintiff, not only as to the money in court, the proceeds of the goods, but also as to the plaintiff's damages. The statute says that such order may be enforced in the same manner as any order made in a suit may be: that is, if necessary may be enforced by execution. There was no necessity for that, however, for the judgment creditor immediately paid into court the £15 directed to be paid by him. The effect of this adjudication is, that the money in court, £11 15s., and the £15 paid, is the property of this plaintiff, and the judge of the county court can make no further order in the matter, whatever may be the result of this application. If we shall adjudge that the defendant is now too late to stay this action, the plaintiff then will obtain a satisfaction from the bailiff for the value of the property, and he may also take from the division court the proceeds of the sale of the property, and the damages paid in there to his credit.

The rule should be made absolute to stay proceedings, without costs, however. The defendants should have applied in Easter Term to rescind the judge's order discharging the summons, if he had any reason to think the plaintiff did not intend to abide by the decision of the judge of the county court made on the 17th of March. When he plainly saw that the plaintiff did not intend to proceed, by his serving a declaration on the 22nd of August, he should have applied then, in Trinity Term, to rescind the order, or at all events have renewed his application, either to the court or a judge, to stay further proceedings in the suit. He only comes at the last moment, before the plaintiff might perfect his judgment, by entering it upon the verdict.

McLEAN, J., concurred.

Rule absolute, to stay all further proceedings in the suit, without costs.

DALY V. THE BUFFALO AND LAKE HURON RAILWAY CO.

Arbitration—14 & 15 Vic., ch. 51, sec. 11—Appointment of third arbitrator.

Plaintiff and defendants each appointed an arbitrator, under 14 & 15 Vic., ch. 51, sec. 11, to value certain lands of the plaintiff required by defendants for their railway. The two arbitrators, not being able to agree upon a third, went to the judge of the county court, who upon their application appointed a third. No notice was given to the railway company of the intention to make such application, but it appeared that the arbitrator appointed by them was their general agent for obtaining the land required for the right of way: that on three other occasions the judge, acting on his request as representing the company, had made similar appointments, and on one the defendants had paid the amount awarded. The arbitrator, however, swore that he had no authority to apply to the judge in this case, and that on the other occasion his proceedings were sanctioned by the solicitor for the company. The plaintiff having sued the company upon the award made:—

Held, that the third arbitrator was properly appointed; and the award was sustained.

The declaration set forth that the plaintiff and defendants entered into an arbitration, to ascertain the value of certain lands situate in the village of Stratford, the property of the plaintiff, and taken by the defendants for their railway, and the damages to arise by the defendants exercising the powers of the statute given them; that Donald McDonald was appointed by the defendants as their arbitrator, in pursuance of the provisions of the Railway Clauses Consolidation Act, and that the plaintiff appointed one Andrew Monteith: that these two could not agree upon a third arbitrator, and the plaintiff, by his agent, the said Monteith, and the defendants, by their agent, the said McDonald, made application to the judge of the county court to appoint a third arbitrator, pursuant to the statute: that the judge of the county court did appoint one Thomas B. Guest to be the third arbitrator, and when he made the said appointment he fixed the 1st of April, 1857, as the day on or before which the said award should be made: that the three arbitrators were duly sworn before a justice of the peace, and took upon themselves the burthen of the arbitration: that said arbitrators met to decide and award on the matters referred to them, and that Monteith and Guest, on the 30th of March, 1857, made an award, and awarded to the plaintiff the sum of £1000 for the purchase money and compensation for the lands taken, and damages sustained and to be sustained by the plaintiff, by the exercise

of the powers of the company in respect of the same, and directed the said sum to be paid at the time of the execution by the plaintiff to the defendants of a good and sufficient deed in fee simple of the lands so required to be taken. The declaration then averred that the defendants had taken and still held possession of the lands, and though the plaintiff had executed a good and sufficient deed of the lands, and tendered the same to the defendants, yet the defendants had hitherto wholly neglected and refused to accept the same, or perform their part of their award, and pay the money.

The defendants pleaded—1st. That the lands taken were taken for the purposes of the railway: that a notice was served on the plaintiff containing a description of the lands required, and stating that the company were willing to pay the sum of £246 as compensation for the land, and damages sustained, and the name of an arbitrator if the offer should be rejected, which notice was accompanied by the certificate of Orpheus Robinson, a sworn surveyor, that the land was required for the railway, and that the sum offered was in his opinion a fair compensation for the lands, and for all damages occasioned by the construction of the railway: that the arbitrator named was said McDonald, and that the plaintiff notified the defendants that he refused to accept the sum offered, and that he had appointed Monteith as his arbitrator: that the two arbitrators appointed Guest as the third, and that then, before any award made, the defendants, in pursuance of the statute, gave the plaintiff notice that they desisted from their notice, and that after they had desisted Monteith and Guest proceeded with the reference, and made the pretended award stated.

2nd. That Monteith and Guest did not make the award as alleged.

3rd. That McDonald was not appointed by the defendants to be arbitrator on behalf of the defendants as alleged.

4th. That the judge of the county court did not duly appoint Guest to be the third arbitrator, pursuant to the provisions of the statute.

5th. That defendants had no notice of the time being

fixed for the meeting of the arbitrators, nor of any proceedings by the arbitrators prior to the award.

6th. That defendants had no notice of the application by the plaintiff, or on his behalf, to the judge of the county court, for the appointment of a third arbitrator.

7th. That the sum awarded was excessive and fraudulently exorbitant, and the award was made by fraud, covin, and misrepresentation.

8th. That the plaintiff duly received a notice of desistment from the defendants, prior to the making the award, and received the cost of the proceedings payable to the plaintiff on said desistment, and thereby waived and abandoned said arbitration, and put an end to the same.

The plaintiff took issue on all the pleas.

At the trial before *Burns, J.*, at Stratford, it was admitted that the appointment of McDonald on the part of the company, and the appointment of Monteith on the part of the plaintiff, were regularly made upon the notice given by the company : that the plaintiff's land had been taken by the company, and that £246 was offered to be paid for it, and refused by the plaintiff. The contest between the parties was as to the regularity of the appointment of the third arbitrator by the judge of the county court. The application to the judge of the county court to appoint the third arbitrator was made by McDonald and Monteith, they not agreeing upon one themselves. The defendants contended they were not bound by such an appointment, and had not themselves any notice of a meeting of the arbitrators ; while, on the part of the plaintiff, it was contended that McDonald was so far an agent of the company that it was not necessary to give the company notice of the application to the judge of the county court to appoint the third arbitrator according to the 14 & 15 Vic., ch. 51, section 11, sub-sec. 10, and that the company were bound by the acts of McDonald, without any notice to them. It was proved that in January, 1857, Monteith, who had been appointed by the plaintiff as his arbitrator, communicated to the secretary of the company at Brantford that he desired a meeting with the company's

arbitrator, to proceed, and on the 19th of January the secretary of the company replied as follows :

“ Mr. Andrew Monteith,
Stratford, C. W.,

SIR,—In reply to your letter of the 13th inst., received this morning, I have to inform you that Mr. McDonald is presently at Toronto. I shall request him to arrange a meeting with you immediately on his return, which I expect will be to-morrow or Wednesday.”

For some reason the two arbitrators did not meet each other till the 9th of March, no other communication passing between the parties than the above-mentioned, after the appointment of the two arbitrators. On the 9th of March, the two arbitrators not agreeing upon the appointment of a third, they at once, without communication to either party, went before the judge of the county court, and asked him to appoint a third person, and upon such request he did appoint Thomas B. Guest. After that being done, the arbitrators were sworn before a justice of the peace, and on the 19th of March Monteith and Guest made their award, and ordered the company to pay the plaintiff £1000 for the purchase money of the land and compensation, and for all damages sustained or to be sustained by the plaintiff, and £6 for the expenses of the arbitration, and directed the plaintiff to convey the land to the company. It was proved, on the part of the plaintiff, that on other occasions McDonald had acted as agent for the defendants in purchasing the right of way for the railway, and paid the persons upon his own agreement. The judge of the county court stated that he made the appointment of a third arbitrator on the verbal request of Monteith acting for the plaintiff, and of McDonald acting for the defendants: that he had on three several occasions before the present, on the request of McDonald acting for defendants, made appointments, and on the present occasion never questioned his authority, or asked anything about a notice having been given that he would be applied to for the purpose of making the appointment; and he stated that McDonald made no objection before him to the regularity of the proceedings. It was also proved by others, who sat as

arbitrators with McDonald, that appointments had been made in a similar manner, and that on one occasion the defendants paid the amount awarded. It was also proved that the two arbitrators, Monteith and Guest, before being sworn to act, went together and looked at the local position of the land, and that McDonald was asked to go also, but he declined. After they met to act, witnesses on the part of the plaintiff were examined as to the value, &c., of the land, and McDonald, acting for the defendants, produced a witness for the same purpose. Witnesses were examined on the plaintiff's part, and a map of the plaintiff's lands, and the position of the railway station and track, were shewn to the jury, to convince them that the arbitrators had placed no more than a proper value upon the land taken, and damages sustained by the plaintiff.

On the part of the defendants it was asserted, and not denied, that upon all the occasions, except the one spoken of, in which the company did afterwards pay the amount awarded, the solicitor of the defendants was made aware of the proceedings for arbitration, and sanctioned McDonald's application to the judge of the county court for appointment of a third arbitrator. McDonald was examined, and he stated that he acted as a general agent for the company in purchasing the right of way, but had no authority whatever in legal matters, or in any way to bind the company in references to arbitration, but that he acted as arbitrator for them as appointed. He stated that when he met Monteith, and they could not agree upon the appointment of a third person, Monteith proposed to him that they should go before the judge of the county court, and have him appoint a third person, that he objected that it was irregular, but that Monteith insisted it was regular, and he then consented; that the defendants, by themselves or their solicitor, knew nothing about it, and had no notice whatever of the meeting of the arbitrators. With respect to the case similar to the present, in which the company had paid the amount awarded, he stated he did not recollect it, but if it was so he had no more authority in that case than in the present, and in the present he denied that he had any authority whatever from

the defendants to ask for the appointment of a third arbitrator. He considered the amount awarded an outrageous sum.

The learned judge left it to the jury to say whether the sum awarded was an excessive and fraudulently exorbitant amount, and whether the award was made by fraud, covin, and misrepresentation. The jury found that the sum awarded was a fair value for the land, and proper compensation for damages.

A verdict was entered for the plaintiff for £1040, subject to the opinion of the court upon the evidence, whether the defendants were legally bound to pay this award; the court to be at liberty to draw all inferences that a jury might do as to the authority of McDonald to bind the defendants, in case it should be necessary to consider the matter in that light.

The case was argued during last term.

Christopher Robinson, for the plaintiff, cited 14 & 15 Vic., ch. 51, sec. 11, sub-secs. 5, 7, 9, 10, 11, 16, 17, 18, 19; *Angell and Anes on Corp.* secs. 281, 284, 288, 291, 297; *Grant on Corp.*, 60, 61; *Story on Agency*, 5th Ed. secs. 17, 18, 52, 53, 85, 126; *Shelf on R. W.* 112, 704; *Regina v. Grimshaw*, 10 U. C. R. 747; *Scotthorn v. South Staffordshire R. W. Co.*, 8 Ex. 341; *Cox v. Midland Counties R. W. Co.*, 3 Ex. 268; *Backhouse v. Taylor*, 20 L. J. (Q. B.) 233; *London and Birmingham R. W. Co. v. Winter*, 1 Cr. & Ph. 57.

J. Duggan for defendants.

ROBINSON, C. J.—On the report of this case made by the learned judge who tried it, I think the verdict was properly rendered for the plaintiff, and that the postea should be awarded to him.

I see no sufficient ground for denying the validity of the award. No question is raised as to the regularity of McDonald's appointment as arbitrator on behalf of the company. The proceedings are to be considered with reference to the Railway Clauses Consolidation Act, 14 & 15 Vic., ch. 51. It was proved that McDonald was the general agent for the

company for acquiring the lands necessary for their railway. The plaintiff, having notice of his appointment as arbitrator, acquiesced in it, making, as it appears, no objection, either on account of McDonald's being in the employment of the company, or on any other ground. He appointed one on his side to meet Mr. McDonald, and the contest at the trial was only about the legality of the next step in the proceedings—namely, the appointment of the third arbitrator. The two could not agree upon a third, and so it rested with the judge of the county court to appoint him, under the 10th section of the 11th clause, which says that he shall make the appointment on the application of the proprietor of the land, or of the company. Here the plaintiff's arbitrator and the company's arbitrator, Mr. McDonald, who was also the company's agent for acquiring and settling for the land taken, went together to the judge, and asked him to make the appointment, which he did. I think that was a reasonable and sufficient compliance with the act, so far as regards the channel through which the application was made to the judge. The judge is authorised to appoint, on the application of either party.

The plaintiff, by adopting the award, ratifies what had been done by his arbitrator on his behalf, and so sanctions the request of his to the judge to appoint the third arbitrator, so that it does not rest solely on the point whether the company's arbitrator was authorised to make the request for them; but if it had depended on that, I should have held that the request of Mr. McDonald was a sufficient request by the company, whom he represented, both as arbitrator and as their general agent for such matters. When we consider that the two arbitrators had full power of themselves to have appointed a third arbitrator, without consulting either party; and further, that the judge had as clearly the authority, when called upon, to proceed without referring to the parties, on the subject of the selection he was to make, it would be contrary to reason, and to the spirit of the act, I think, to hold that a request from Mr. McDonald to the judge was insufficient; and if this be so, as I think it is, then any question about the day's notice to the other of

intention to make the request, as provided in the 10th subsection, becomes unimportant, because the plaintiff (the other party) is the only person who could object to want of notice of the application to the judge by the company, through their agent, and he by adopting and suing on the award, precludes himself from objecting on that account.

There was, besides, evidence that on similar occasions the appointment of a third arbitrator had been made by the judge of the county court, in the same manner, at the instance of their agent, Mr. McDonald, whose authority so to act does not appear to have been before denied by the company. It seems to me to belong fairly to his character of their general agent for acquiring lands and settling claims along the line; and as to another objection that was taken, that the company had not notice of the time or times appointed for the sitting of the arbitrators, the 11th subsection of the 11th clause provides expressly that "no notice to either of the parties shall be necessary, but that they shall be held sufficiently notified through the arbitrator they shall have appointed, or whose appointment they shall have required." This enactment recognizes the arbitrator as representing sufficiently the party for which he was chosen, at least for the important purpose of receiving notice of the time appointed for hearing the merits of the case.

As to the amount awarded being excessive, if the sum tendered was anything like the value, the amount awarded, we must fear, is greatly beyond it; but we cannot entertain that question, except for the purpose of disposing of the issue under the seventh plea, and nothing short of evidence or actual fraud could under that plea defeat the plaintiff's action upon the award. The jury found the sum awarded to be the fair value of the property, and they found that there was no fraud.

We feel bound, therefore, to award the *postea* to the plaintiff.

BURNS, J.—The legal question, whether the defendants are to be bound by the award, turns upon the validity of the appointment of the third arbitrator. At the trial, I was rather

disposed to hold that it was necessary to shew, before the judge of the county court could make the appointment, that he should have been requested to do so, either by the plaintiff or by some one having authority from the company, after notice given one clear day to the other party, and that the appointment made in the manner proved was insufficient. My attention was not then directed to the provisions of the 11th sub-section of the 11th section of the act, in which it is enacted that, as to the meeting of the arbitrators, no notice to either of the parties shall be necessary, but they shall be held sufficiently notified through the arbitrator they shall have appointed, or whose appointment they shall have required. If neither of the arbitrators had made any request to the judge of the county court to appoint a third arbitrator, then a notice would have been required to be served by the party requiring the judge to make the appointment, and so it would have been if the request was made to the judge by either of the arbitrators acting as the agent of the party. In this case the plaintiff adopted his arbitrator as his agent, and he cannot dispute the validity of the appointment of the third person; so far then as his appearing before the judge of the county court, and invoking him to make the appointment, can affect the case, it was regular. The statute does not require that both parties should concur in requesting the judge to make the appointment: either may do that act. The arbitrator of the company appeared also before the judge with the plaintiff's arbitrator to request an appointment to be made; and although it may be argued, as it was at *nisi prius*, that he had no authority to bind the company by such a request, and strictly speaking, perhaps, he would require to have had greater powers than were proved he exercised to bind the company in that way, yet the question is, whether his assent to the request made by the other party is not sufficient to dispense with the one day's notice to the company of the exercise of the power vested in the county court judge. Seeing that on other occasions appointments were made in a similar manner, and which have been recognized by the defendants, also that the legislature has

expressly enacted that notice to the arbitrator of the meeting of the arbitrators shall bind the parties naming the arbitrators, it was, I think, competent for the defendants to waive a notification to them that the judge was requested to make the appointment. Having their arbitrator before the judge, looking after their interests in his making a choice of a third person, and having recognized the same thing before, very well warranted the judge acting without it having been made to appear before him that the one day's notice had been given to the defendants.

For the reason, therefore, that the defendants have assented to the judge acting on the request of the plaintiff to make the appointment, and not on the ground that the defendants, through their arbitrator acting as an agent for them, made the request, I think this award must be upheld.

MCLEAN, J., concurred.

Judgment for plaintiff.

SINCLAIR V. HAYNES.

Malicious prosecution—Proof of information—Necessity for arrest—Termination of proceedings.

In an action for malicious prosecution for felony before magistrates, it is not necessary to prove that defendant laid an information on oath, where that is not averred in the declaration: it is enough to shew that he set the magistrate in motion.

Nor is it indispensable to sustain such action that the party charged should have been arrested or imprisoned.

In this case the plaintiff, on receiving the magistrate's summons, attended in obedience to it. The charge of felony made against him by defendant was dismissed; but the magistrates thought he had been guilty of misconduct in the same matter, and he was requested to attend on another day, to which they adjourned for the purpose of considering that point.

Held, that the determination of the proceedings with regard to the charge complained of was sufficiently shewn.

Action for malicious prosecution before a magistrate.

The declaration stated that the defendant, intending to injure the plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, on the 5th of November, 1857, went before two justices of the peace, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having fraudulently taken away a hat belonging to the defendant,

and selling it to one Donald McColl, and likewise with embezzling and holding in his possession divers goods and money belonging to the defendant; and upon such charge the defendant caused and procured the justices to make and grant their warrant for summoning, commanding, and bringing the plaintiff before them, to be dealt with according to law for the said supposed offence; that the defendant, by virtue of the said warrant, caused and procured the plaintiff to attend and appear before the justices, on the 25th of November, 1857, to be examined by them touching and concerning the said supposed crime; and the justices having heard and considered all that the defendant and divers witnesses could say or allege against the plaintiff, then adjudged and determined that the plaintiff was not guilty of the said supposed crime, and then caused the plaintiff to be fully acquitted and discharged of the said offence, and the defendant no further prosecuted the same, and the said complaint and prosecution was wholly ended and determined: by means, &c.

The defendant pleaded—1. Not guilty; and, 2, That the plaintiff was not acquitted or discharged, as alleged.

At the trial, at Toronto, before *Burns, J.*, the plaintiff's case was proved as follows: two magistrates, who sat with the two who granted the summons, were called. They proved that the warrant of summons, dated the 5th of November, 1857, addressed to the plaintiff, commanding him to appear before them at Campbell's Cross, in the township of Chinguacousy, on the 7th of November, was placed in the hands of a constable, to serve on the plaintiff. The plaintiff had removed from Chinguacousy to Saugeen, on lake Huron, and the magistrate who was examined as a witness stated that he informed the two who had issued the summons that there was, he thought, no necessity for their warrant to arrest the plaintiff then, but that if the summons were enclosed to him, he had no doubt that the plaintiff would present himself at once, and answer to the charge. The summons was placed in the hands of this magistrate, who put a memorandum at the foot, directing the plaintiff to appear on or before the 28th of November, and he enclosed

it by post to the plaintiff. The plaintiff, immediately on receiving the summons, came from Saugeen to Chinguacousy, and met the defendant, and it was arranged that the parties should go before the magistrates on the 25th of November. The magistrate who enclosed the summons to the plaintiff, stated that before doing so he cautioned the defendant about making the charge, for he thought it frivolous. On the 25th of November the plaintiff and defendant met before the magistrates—that is, the two who had issued the summons, and the two examined as witnesses, who were called in to assist at the investigation. The defendant, it was stated, appeared as prosecuting the charge, bringing the witnesses, and examining them. The person named in the summons was examined as a witness before the magistrates, and also gave his testimony in this case to this effect: namely, that in June or July, 1857, when the plaintiff was a clerk to the defendant in a shop of his, he bought a hat at the defendant's shop, which he did not pay for at the time, and which the plaintiff carried to his house in the evening. In November afterwards, and after the plaintiff had left the defendant's employment, the defendant asked McColl whether he had not purchased a hat at his store. McColl at first said he had not, as he stated his object was to ascertain what price the defendant would ask for a hat he then had in his hands. The defendant replied, he thought he had got one, for he remembered the plaintiff one evening asking him to attend the shop while he, the plaintiff, took a hat to the house of McColl. That being stated, McColl said it was true he had got a hat, and the defendant said it was not charged to him, McColl, and had not been paid for. McColl said if it was not charged to him, he had no objection that it should be, and would pay for it, and subsequently he did pay for it. It was after receiving this information that the summons was issued by the magistrates. On the evidence, and other evidence, the two magistrates who were examined stated that they, and the two who had issued the warrant of summons, all concurred in opinion that there was no charge of felony or embezzlement made out, and they discharged the plaintiff from that, but the magistrates thought they might

entertain some kind of charge for neglect of duty in not charging the hat to McColl; and for the purpose of considering whether they could do that, and to make some order about the expenses and costs of the proceedings, they adjourned for eight days. At the time appointed one of the magistrates who had been called in attended, but none of the others came; and he said he never heard anything more of the matter. The other magistrate who was called in stated that he did not attend the adjourned meeting, in consequence of receiving a letter from one of the magistrates who had issued the summons, respecting the discharge of the plaintiff. Other evidence was given to shew malicious expressions towards the plaintiff.

The information upon which the summons was originally issued was not proved, neither were the magistrates who issued the summons called as witnesses by either side.

Eccles, Q. C., for the defendant, moved for a nonsuit, on the grounds—1. That the action was not sustainable upon the record and evidence. 2. That it was not proved that there had been any legal termination of the proceedings before the magistrates.

The learned judge overruled the last objection, stating that it was a question of fact, on the evidence of the two magistrates who were examined; and if it were not true as they stated, the defendant might call the others, and establish the truth of his plea; that with respect to the first objection, if it was patent upon the record the defendant could object in arrest of judgment; but if the objection were to be made out from the evidence, he would reserve leave to the defendant to move to enter a nonsuit.

He told the jury it was a question of fact for them to consider, whether the defendant was the prosecutor or promoter of the charge, and that it was not necessary to prove that he had made any charge upon oath, in order to set the magistrates in motion; and, next, it was a question of fact for them to say, whether the plaintiff had been discharged from the charge, and for that purpose it was unnecessary to shew any record or adjudication in writing. With respect to whether the charge was made maliciously or not, the jury

had the evidence of McColl to shew that defendant was himself fully apprised of the facts before he set the magistrates in motion, and there was no evidence to shew that he had been advised by the magistrates or others to pursue the course he did.

The jury found for the plaintiff, and £50 damages.

Eccles, Q.C., obtained a rule to shew cause why the verdict should not be set aside, as being contrary to law and evidence, or why a nonsuit should not be entered pursuant to the leave reserved, or why the judgment should not be arrested, because the declaration did not shew that the plaintiff was arrested or deprived of his liberty,

Cameron, Q.C., shewed cause, and cited *Delegal v. Highley*, 3 Bing. N. C. 951; *Michell v. Williams*, 11 M. & W. 205; *Haddrick v. Heslop*, 12 Q. B. 267; *Milton v. Elmore*, 4 C. & P. 456; *Delisser v. Towne*, 1 Q. B. 333; *Clements v. Ohrly*, 2 C. & K. 686; *Cotterell v. Jones*, 11 C. B. 713; *Farley v. Danks*, 24 L. J. (Q.B.) 244.

Eccles, Q. C., supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the evidence in this case, and the objections taken at the trial. It was not necessary, in our opinion, to prove that the defendant made an information on oath. It was enough to shew that he set the magistrate in motion. It is not alleged in the declaration that the defendant did make any information on oath; the fact therefore is not brought in issue, and the action may be sustained without shewing it.

As to the second objection, that the prosecution is not shewn to have been terminated—that is, legally and finally—we find several cases in which the allegation was merely, as in this case, that the person prosecuted was discharged by the magistrate, as in *Gregory v. Derby* (8 C. & P. 749); and it is not indispensable to an action for malicious prosecution that the party charged should have been arrested or imprisoned. On the contrary, it is laid down that the damage which will sustain the action may be either to the plaintiff's person by imprisonment; to his reputation, by scandal; or to his property, by expense.

The facts seem to be truly stated in the declaration. The plaintiff came down in consequence of the summons, though not in exact obedience to it in point of time. The defendant had charged him before the magistrates with embezzling a hat. The evidence gives us plainly to understand that that was the charge which this defendant made and endeavoured to support; and the defendant did not attempt to disprove that, either by giving evidence of the terms of his information in writing, if he made any, or by calling either of the parties to whom he made the charge, and from whom he procured the warrant.

Then it was shewn that the justices who issued the warrant found, upon investigating the facts, that, so far as regarded the imputation of a criminal offence, the charge was unsupported, and they discharged the plaintiff from it, but requested his attendance on another day, as they seemed to think he had been wanting in proper conduct towards his employers as a clerk, in not charging the hat, and that they had it in their power to punish for the breach of duty; but as regarded fraudulent embezzlement, the charge was shewn to have been dismissed.

There was some strong evidence to shew malice on the part of this defendant. If indeed the evidence had shewn that all he charged the plaintiff with was the selling the hat, and not charging it, or paying what he had received for it; and if the justices had, by an error of their own, proceeded upon such a statement as upon a charge of felony, the defence would have stood on different ground.

We are of opinion that the verdict must stand.

Rule discharged.

WEGG V. DRAKE.

Sale of goods—Proof of acceptance.

Held, in this case, where plaintiff sued for the price of a carriage which he had agreed to make for defendant, that upon the evidence, set out below, there was clearly no sufficient acceptance, within the Statute of Frauds and the 13 & 14 Vic., ch. 61.

Action on common counts, for goods bargained and sold, work and labour, and materials found, and on account stated.
Pleas, never indebted, payment, and set off.

At the trial, at St. Thomas, before *McLean*, J., besides other smaller items, about which there was no question, the plaintiff claimed the price of a carriage which he had made for the defendant, upon an alleged verbal order given in the autumn of 1855. The defendant was a livery-stable keeper, and wished to have a good stage-coach built according to instructions which he gave. He said he did not mind the expense: that he wished it finished during May, 1856, but if that could not be done, he wished the plaintiff to take such time as might be necessary for making it a first-rate carriage. It was not finished till the autumn of 1856, and then the defendant refused to take it, objecting to some defects in the wood work, the panels and other parts being cracked so as to make the imperfection visible.

The defendant's council objected, that the Statute of Frauds, and our own statute, 13 & 14 Vic., ch. 61, sec. 7, prevented the plaintiff from recovering without an agreement in writing, and the learned judge inclined to that opinion, as the carriage had not been accepted.

The jury found for the plaintiff £256 9s. 9d., and valued the carriage at £225; and leave was reserved to the defendant to move to have that amount deducted from the verdict.

S. Richards obtained a rule *nisi* accordingly, to which *Read* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is impossible to argue that, since our statute, the 13 & 14 Vic., ch. 61, sec. 7, such a demand can be recovered without evidence of a contract in writing.

There was certainly no acceptance, and the fact that at the time of the contract the article had not yet been made, and was therefore at that time incapable of delivery, is no longer a reason why the statute shall not be applied. That there was no acceptance of this carriage is very clear, we think: indeed the defendant all along objected, and not without reason. In Addison on Contracts, 248, this subject is well discussed. I refer to the cases of *Wright v. Percival* (8 L. J. Q. B. 258), and *Maberley v. Sheppard* (10 Bing. 99). It is not on the ground that the plaintiff had still a lien on

the carriage for his price that we consider acceptance cannot be held to have been proved in this case, for although that has been held erroneously to be a criterion in some cases, it is not so considered at this day, and it is most reasonable that it should not be. But in this case there really was no evidence of delivery and acceptance, for the defendant was always dissatisfied with the carriage, and never agreed to accept it from the time it was completed.

Rule absolute.

FOLEY V. MOODIE, SHERIFF.

Sale for taxes—Distress—16 Vic., ch. 182.

Under the 16 Vic., ch. 182, the sheriff may sell land for taxes, as directed by the writ, unless he has good reason to believe that there is sufficient distress.

A declaration, therefore, which charged him with neglect of duty in selling when there were goods on the land to distrain, but did not aver that he had notice of the goods being there, was held insufficient.

The plaintiff sued defendant, sheriff of the county of Hastings, in an action on the case, setting forth that the plaintiff owned certain land in the county of Hastings: that an arrear of taxes having accrued upon it, a writ issued, commanding defendant as sheriff to levy upon the land the amount of the taxes in arrear, and costs: that when that writ was delivered to the sheriff, and from thence continually until after the return thereof, there was sufficient distress upon the land, of goods and chattels liable to seizure, to make the amount directed to be levied, and the costs; but that the sheriff, disregarding his duty in that behalf, did not levy the said money out of the said goods and chattels, but neglected and refused so to do, and wrongfully sold the said land, and conveyed away the same, contrary to his duty.

It was not averred in the declaration that the sheriff had at any time notice or knowledge that there was distress upon the land.

The defendant pleaded, in his third plea, that although he gave due notice of the sale of the land, neither the plaintiff nor any other person gave notice, at any time before the sale, or at the time, of there being distress upon the land; and he pleaded, as his fourth plea, that before the time

allowed by law for redemption after the sale, the plaintiff had due notice of the sale, and might have redeemed if he would.

The plaintiff demurred to these pleas, and the defendant took exception to the sufficiency to the declaration, insisting that it ought to have shewn that the sheriff had notice or knowledge of the distress being on the land, for that without this there was no such duty incumbent on the sheriff as is alleged.

Wallbridge, Q. C., for the demurrer.

Bell (of Belleville), contra, cited *Spafford v. Sherwood*, 3 O. S. 441.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, after considering the 47th, 54th, 55th, 57th and 58th clauses of the statute 16 Vic., ch. 182, that whatever may have been the case under the previous acts, which this act repeals, the sheriff may, when he receives a writ under this statute, assume, if he hears nothing to the contrary, that it is proper for him to go on and advertise the land for sale, in order to make the arrears, and to sell as the law points out. The writ is not directed to be conditional in its terms: that is, to sell land, *if there are no goods*, as it was required to be under the 6 Geo. IV., ch. 7.

Considering the provisions of this statute to which we have referred, it may fairly be assumed by the sheriff, when he receives a writ commanding him to make the taxes from sale of the lands, that the treasurer has ascertained that they cannot be otherwise made, or else the collector and treasurer, under the 47th and 54th clauses, would have collected the arrears, and no writ to the sheriff would have issued.

All that the plaintiff can insist on is, that if the sheriff, after he got the writ, "*had good reason to believe*" that there were goods on the land, he ought, according to the 58th clause, to have levied the money out of the goods, and should not have sold the land. Till he shews that the sheriff "*had good reason to believe*," &c., he does not shew any duty incumbent upon him under that clause, nor otherwise, that we can gather from the statute.

If the plaintiff meant to contend that the sheriff had the duty incumbent on him to search for distress upon the land before he proceeded to sell, and that he did not search, then he ought to have rested his action upon neglect of that duty. Whether we could have recognized such a duty as being incumbent on the sheriff we need not determine, for the plaintiff has not rested his action upon the neglect of the sheriff to inform himself. He assumes that if in fact goods were there, the sheriff was bound to know it without any notice, however cunningly they might be concealed, and though they might have been openly on the lot at one time, but withdrawn at another.

Without determining that either of the pleas is sufficient, the defendant is entitled, we think, to judgment on the demurrer.

Judgment for defendant on demurrer.

WATTS v. TAFT ET AL.

Limited partnership—Share of special partner not paid in cash—Admissions of liability—12 Vic., ch. 75, secs. 2, 4, 10.

Under 12 Vic., ch. 75, secs. 2, 4, the money to be contributed by the special partners must be actually paid in cash, or they will be liable as general partners.

Where the note was signed T. & Co., and it was asserted that the firm was a limited partnership, composed of T. as general and W. as special partner, but it appeared that W., when he gave the note, had represented to the payee that he was a partner, and had an interest in the business—*Held*, sufficient to warrant the jury in finding W. equally liable with T.

Action upon a promissory note, made in the name of H. N. Taft & Co., dated the 15th of April, 1857, payable to the defendant Heaton, for the sum of £1,000, at three months after date, and indorsed to the plaintiff. The declaration charged defendant Wilkes as a maker of the note, under the firm of H. N. Taft & Co., and Heaton as indorsee.

Pleas—1. By the defendants Taft and Wilkes, that they did not make the note as alleged. 2. A further plea, by the defendant Wilkes, that he and Taft entered into partnership on the 5th of July, 1856, under the provisions of the statute 12 Vic., ch. 73: that Wilkes was a special partner, and contributed in actual cash payments the specific

sum of £1,250 as capital to the stock of the partnership : that Taft and Wilkes duly filed the certificate required by the act, setting forth all the particulars required, which was duly filed and recorded in the office of the clerk of the county court of the county of Brant : that the note was made by the defendant Taft as the general partner during the continuance thereof, and that the defendants Wilkes and Taft did not otherwise make the note.

Replication.—That the defendant Wilkes did not contribute and pay the said sum of £1,250 in cash, and that the promissory note in the declaration mentioned was drawn for the accommodation of the defendant Wilkes, and not for the use of the firm, and the said Wilkes was and is a general partner in the said firm, and transacted the general business of the firm. On this, issue was taken.

The defendant Heaton allowed judgment to go by default as against him.

At the trial, before *Burns, J.*, at the last assizes held at Brantford, the plaintiff called the defendant Heaton as a witness, who proved the signature of the firm to the note to be made by Taft, and that the note was passed to him by the defendant Wilkes, to secure him, the witness, for demands owing to him by Wilkes individually; and that Wilkes represented to him that he was a partner, and had an interest in the foundry carried on by Taft & Co. Heaton had endorsed the note to the plaintiff, to secure the plaintiff against an indorsation of his for Heaton, for £750. On the part of the defendant Wilkes, the book-keeper of the firm of Taft & Co. was called, and the book-keeper of Wilkes, and they proved these facts : namely, that the partnership was composed only of Taft and Wilkes : that the capital of Taft in the partnership was his labour and services in the concern : he has not to put in money ; the defendant Wilkes was to put in \$5,000 in money, as it should be wanted or required to carry on the business of the firm ; and the buildings for the business of the firm were owned by the defendant Wilkes, and rented to the firm. As a matter of fact, in carrying on the business of the firm the money was not paid in at once, but was to be and was paid in as required ; and the

money so paid in was procured upon the drafts drawn by the firm of Taft & Co. upon the defendant Wilkes. The defendant Wilkes accepted drafts drawn in this way, not only to pay the \$5,000, but to an amount of about \$9,000 beyond the \$5,000; and it was for and on account of the excess that the note in question was made by Taft & Co., payable to the defendant Heaton.

The learned judge directed a verdict against all the defendants, and reserved leave to the defendant Wilkes to move to enter a verdict for him, if the court should be of opinion, on his plea, the replication to it, and the evidence, that he was not liable to be sued as a maker of the note.

M. C. Cameron obtained a rule to shew cause why the verdict should not be entered for the defendant Wilkes, pursuant to leave reserved, or why the present verdict should not be set aside, as being contrary to law and evidence.

Burns shewed cause, and cited *Bowes et al. v. Holland et al.*, 14 U. C. R. 316; *Hutchinson v. Bowes et al.*, 15 U. C. R. 156; *Whittemore v. Macdonell et al.*, 6 C. P. 547.

ROBINSON, C. J., delivered the judgment of the court.

Upon the facts of this case, we are of opinion that the defendant Wilkes was liable as a general partner. It is clear, upon the statute 12 Vic., ch. 75, that the money to be contributed by the special partner must be actually paid in upon the formation of the partnership; whereas here that was not the case, but the special partner was to pay it in as the exigencies of the business might require, or as might suit his convenience. The second and fourth clauses, and the schedule, equally shew the intention to be that the capital furnished by the special partner is to be actually paid in when the partnership is formed. This was not done, and therefore, under the seventh clause of the act, the defendant Wilkes would in consequence be liable as a general partner, because the certificate either did not state that fact truly, or if it did it must have shewn that there was no limited partnership legally formed.

Then, again, under the tenth clause of the act, if there

was no general partner besides Taft, there was no other person who could be supposed to come in as a general partner under the firm of Taft & Company; and it was proved that when the defendant Wilkes gave this note to the payee, to cover a liability of his own, he represented that he had an interest in the concern, and was a partner, which would certainly lead any one to infer that he intended to represent himself to be liable as a partner upon that note, under the signature of Taft & Co.; and unless he was liable, there would be no company liable under that signature.

We think that circumstance, if it were material for the plaintiff to rely upon, it might furnish reasonable ground for a jury to conclude that the note had been given with his concurrence, upon some arrangement relating to the business of the firm. Although Wilkes' name did not appear as a maker, yet, as the statute provides, in the tenth clause, that only the name of the general partner or partners shall be used, and as the defendant represented himself as a partner, when, according to his own account, there could be no other general partner besides Taft, unless he himself were one, he certainly afforded reason to contend that he held himself out as the person associated with Taft, and equally liable with him.

But upon the ground that defendant Wilkes did not prove his plea, for that he had not contributed his capital of £1,250 within the meaning of the act, we think the verdict was properly rendered against him, and that the rule *nisi* should be discharged.

Rule discharged.

GRAHAM V. THOMPSON.

Arrest set aside on condition that no action shall be brought—Meaning of condition.

Where an arrest is set aside on condition that no action shall be brought, that means no action which could not have been brought unless the writ had been set aside. Defendant therefore is not restrained from an action against the plaintiff for maliciously arresting him, without reasonable or probable cause for believing that he was about to leave the country.

Fitzgerald obtained a rule on the plaintiff, to shew cause why all proceedings in this cause should not be set aside, on

the ground that the arrest for which this action was brought was set aside on condition that no action should be brought for said arrest.

On the 4th of July, 1857, an order of a judge in Chambers was made setting aside the arrest of this plaintiff *with costs*, on condition of no action being brought for the said arrest.

The plaintiff took the benefit of the order, and was discharged, and brought this action against the plaintiff in that suit (the present defendant) for maliciously arresting him, not having any reasonable or probable cause for believing that he was immediately about to leave Upper Canada with intent to defraud him.

The defendant contended that the bringing such action was a violation of the condition on which the plaintiff obtained his discharge with costs of the application.

McMichael shewed cause, and insisted that the condition only restrained him from bringing such an action as the present.

ROBINSON, C. J., delivered the judgment of the court.

We have no hesitation in saying that this rule must be discharged. The defendant's counsel relied on the unqualified words of the condition in the judge's order, which gave to the defendant in the former action the costs of his application, on condition that he should bring no action against the plaintiff in that action, who is now defendant in this. He cited no authority, however, to shew that such a use has ever been attempted to be made of that condition as he would now make of it, and it would be contrary to reason, because the present plaintiff could have brought an action for a malicious arrest, if there was any ground for it, although the process or arrest had never been set aside. The process did not by any means stand in the way of such an action, and the setting aside the writ gave him in that respect no new right, and the judge consequently, who set it aside, would have had no pretence for asking him to come under any such terms. It is true that the condition is not in words confined to an action of trespass, but it has been

always understood that such is the intention and effect of it ; and the case of *Lorimer v. Yule* (1 Chit. Rep. 134) is an express authority upon the point. The condition means only that the defendant, who has been discharged from arrest, shall bring no action which he could not have brought unless the writ had been set aside.

Rule discharged.

BLAKELY V. GARRETT.

Mistake at trial—Dishonest defence—New trial refused.

Plaintiff sold to E. and took back a mortgage, which he neglected to register, and in the mean time E. sold to defendant, who recorded his deed first. In ejectment brought on the mortgage, defendant objected to the want of registry, but closed his case without having put in and proved the plaintiff's deed to E., to shew that the title was a registered one when defendant got his deed. The learned judge at the trial would not allow the defence to be re-opened ; and as it appeared that the defendant was aware of the mortgage when he purchased from E., and was therefore setting up a dishonest defence, the court refused to interfere.

Stephen Richards moved for a new trial on affidavits.

The ground was, that the defendant's counsel and attorney from an oversight, omitted to put in and prove a deed from the plaintiff to one Ellis, and the registration of the same, which, together with the deed proved at the trial, would have entitled the defendant to succeed.

On the 21st of June, 1852, the plaintiff conveyed the land in question, being a village lot in Wellington, for £17 10s., to one Ellis, which deed was registered on the 28th of April, 1854. On the same 21st of June, 1852, Ellis gave a mortgage to the plaintiff on the same land, in fee, to secure the payment of the purchase money in two years, with interest, and on which was indorsed a payment of £1 12s. 6d., as made on the day of the date. The mortgage was not registered till the 24th of September, 1857.

In the meantime Ellis sold the land to the defendant, and conveyed it by deed, dated the 27th of April, 1854, for an alleged consideration of £25, and this deed was registered on the 29th of April, 1854.

The plaintiff's action was founded on his mortgage, the purchase money secured by it being yet unpaid.

At the trial, at Picton, before *Richards, J.*, the defendant

objected to the plaintiff's title under the mortgage, on the ground that the mortgage was unregistered, and so must be treated as void as against his, the defendant's, subsequent deed from Ellis, which had been registered, but he closed his case without having put in and proved the deed from the plaintiff to Ellis, which would have shewn that the title was a registered title at the time the defendant took his deed.

The defendant's counsel then applied to the judge at the trial to allow him to open his defence, and produce and prove this deed, or to give evidence of the registration of it, in order that he might thus have the advantage under the statute of his prior registry, but the application was refused.

C. S. Patterson shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The learned judge declined to give the permission, from an impression, no doubt, which the evidence had produced, that the defendant was acting most dishonestly, under the circumstances, in setting up his title to defeat the plaintiff's mortgage.

The affidavits filed on the plaintiff's part are very strong to shew that the defendant gave not more than about thirty dollars to Ellis for the land, being fully aware of the mortgage, and having in truth assumed the mortgage debt in his transaction with Ellis as part of the purchase money, knowing well its amount, and having undertaken to pay it. We find no fault with the manner in which the learned judge exercised his discretion in refusing to grant the indulgence desired by the defendant. So far as we can judge from all that is before us, what the defendant is endeavouring to do is grossly dishonest. A court of equity would certainly compel him to pay the mortgage, and he has no claim upon us to assist him in taking so unfair an advantage of the plaintiff. This court might be unable to prevent so unfair an attempt from succeeding at law, but they are not bound to facilitate it by repairing any blunder of the defendant or his counsel. We therefore discharge the rule.

Rule discharged.

REGINA EX REL. GREELY ET AL. V. GILBERT, TOWNSHIP
COUNCILLORS FOR MOSQUITO BAY WARD, IN SOPHIASBURG,
AND SALSURY, RETURNING OFFICER FOR SAID WARD.

Election—No vote tendered for an hour during the first day—Votes afterward received—Close of election.

On the first day of the election more than one hour elapsed without a vote being tendered, but afterwards, on the same day, votes were again received until four o'clock. The returning officer then declared the election closed, and refused to open the poll on the second day, in consequence of the time which had elapsed during the first day without a vote. *Held*, confirming the judgment of the county court, that the election was illegal.

The meaning of the 12 Vic., ch. 81, sec. 159, is, that the poll shall be kept open on the first day till four, and if no votes come up for an hour after the last vote on that day, and if the returning officer sees that all the electors have had a fair opportunity of voting, the election may then be closed.

C. S. Patterson obtained a rule on the relators to shew cause why the judgment of the judge of the county court of Prince Edward, declaring the election of Gilbert void, and adjudging that he should pay the costs, should not be reversed, on the ground that the election was legal, or why the judgment should not be amended, by directing that the relators should pay their own costs, on the ground that Gilbert was proved to have acted in good faith throughout the election, and in supporting the same before the judge.

After hearing the evidence, the learned judge of the county court found the facts to be as follow: the returning officer, with the consent and approval of Daniel Gilbert, but without the consent of William Whitney, the opposing candidate, and against the remonstrance of two of the relator's electors, closed the election at or about four o'clock, P.M., of the 4th of January, the first day of polling, and would not continue the election on the following day (although requested to do so by two of the electors), alleging as his reason for closing on the first day, that more than one hour had elapsed without a vote having been tendered in the early part of the afternoon of that day, and on that account he considered it to be his duty to close the poll at four o'clock on the first day.

It was proved that after such interval of more than an hour having occurred on the first day, the returning officer continued to receive votes for both candidates up to within

fifteen or twenty minutes of four o'clock, and received and recorded in that interval seventeen votes. At the time the poll was closed (that is, finally closed on the first day), only about half of the votes in the ward were polled. These being the facts, the judge adjudged the election to be void, and ordered that the defendant Gilbert should pay the relators' costs.

It appeared from the evidence that the returning officer gave no intimation that he was watching the time on the first day, and intended to close the poll at four o'clock, if an interval of an hour without receiving a vote should occur at any time during the day, though after the hour had elapsed he stated the circumstance, and that he should in consequence close the poll finally at four o'clock on that day, and would declare the person duly elected who should then have the greatest number of votes. He went on after that, and polled seventeen votes, some for each candidate, and then, when four o'clock arrived, closed the poll. He appeared to have acted thus with the full concurrence of Gilbert, and relying in a great measure on his opinion as to the proper construction of the act.

Whitney, the other candidate, it seemed, stated, before the poll was closed (on the first day), that he had no objection himself to the election being closed on that day; but upon some one or more of his supporters remonstrating, and desiring that the election should be adjourned to the next day, he acquiesced, saying that he was in the hands of his friends.

Stephen Richards shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The judge of the county court put the correct construction, we think, upon the statute, though it must be owned that the 159th clause of the 12 Vic., ch. 81, is unfortunately expressed. What is meant, we think, is that the returning officer shall keep the poll open throughout the first day till four o'clock, and if no voter shall come up to vote for an hour or more after he received the last vote on the first day, and before he so closes at four o'clock, *and* if he shall see that all the

electors intending to vote shall have had a fair opportunity of being polled, then he may close the poll finally at four o'clock on the first day. But it cannot be that the legislature intended that after a pause of an hour in the early part of the first day without any voter coming up, he should resume the polling notwithstanding, as soon as a voter should make his appearance, and so go on till four o'clock, and then close the poll finally. His resuming the polling must be taken, we think, as proof that the hour's delay, which had occurred previously, did not arise from the fact that all had then voted who intended to vote, and as the voting continued without an hour's intermission till four o'clock, he was bound to open the poll on the second day, especially when he saw that it was desired by the electors.

We can believe it very possible, however, that the returning officer adopted honestly what appeared to him to be the meaning of the clause, which is certainly awkwardly framed, and therefore it is not to be regretted that he was not adjudged to pay costs. The defendant Gilbert may have been sincere also in taking the same view of the statute, but he, as a party interested, must abide by the consequences of not succeeding in his contest for the seat, or at least may be always made to do so, when there does not appear sufficient ground, from any mal-practice of the returning officer, to throw the costs upon him.

Rule discharged, with costs.

GRAHAM V. WILEY.

Building contract—Agreement to take timber in part payment—Property in such timber when delivered.

Defendant agreed to put up a building for the plaintiff, for £450, and to take in payment thereof from him £250 in materials, at the cost prices, or such quantity as the said building should require, and the balance, if any, in cash. The timber had been all furnished, and the building partly completed, when it was blown down, and the design of going on with it was abandoned.

Held, that the timber so delivered belonged to defendant.

TROVER, for a quantity of square timber. *Pleas*,—1st. Not guilty. 2. Goods not the plaintiff's.

At the trial, at Barrie, before *Hagarty, J.*, it appeared

that defendant had agreed to build a market-house in Collingwood for the plaintiff, who had contracted to build it for an association called the Market Company. The plaintiff furnished about £200 worth of timber to the defendant, upon an agreement between them. The defendant having done some of the work, which was afterwards not gone on with, sued the plaintiff for the value of what he had done, and recovered judgment against him, and then disposed of this timber to others, in order, as he said, to pay himself.

The plaintiff contended, that, as soon as the defendant converted the timber to a use different from that for which the plaintiff had furnished it under the agreement, his, the plaintiff's right to the timber reverted to him, and that so he could sue defendant for disposing of it, and recover its value. The learned judge, looking at the terms of the agreement, thought otherwise, and directed a verdict for defendant, with liberty to the plaintiff to move.

It was proved that on the 16th of September, 1856, the plaintiff and defendant, and one James Spring, entered into an agreement under seal, in which it was recited that the plaintiff had entered into a contract with the Collingwood Market Company, to build them a market-house in Collingwood, and that the said company had transferred all their title and interest in the said market-house to one Joel Underwood, Esquire, to whom the said plaintiff was bound in the same manner as to the said Market Company : and the defendant and Spring thereby agreed with the plaintiff to take the contract off his hands, subject to the same conditions, regulations and agreements, as in the original contract (except to the time for finishing the building), for the sum of £450 ; and to take in payment thereof from the plaintiff £250 in materials, at the cost price, or such quantity as the said building should require, and the balance, if any, in cash, the remaining £200 to be received from Joel Underwood, as according to the original contract : and the defendant and Spring thereby covenanted with the plaintiff to finish the building in a workmanlike manner, on or before the 1st of March then ensuing : that they would commence the work at once, and carry it on as rapidly as possible

under the circumstances; and the plaintiff agreed to furnish the materials at once, so as not to hinder the work.

Attached to this agreement was a memorandum signed by Underwood and by the plaintiff, and also by one Morrow, to the effect that they agreed to pay the defendant and Spring £300, according to the agreement between the latter and the plaintiff, so soon as the building should be completed: this latter agreement not to interfere with Graham (the plaintiff) or the Market Company, or their assigns, under their original agreement, it being merely given to defendant and Spring as collateral security, in consequence of the original contract between the plaintiff (Graham) and the market company being lost or mislaid.

S. Richards obtained a rule *nisi* to enter a verdict for the plaintiff, pursuant to leave reserved. He cited *Farrant v. Thompson*, 5 B. & Al. 826; *Fenn v. Bittleston*, 7 Ex. 152; *Cooper v. Willomatt*, 1 C. B. 672.

McMichael shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This case is singular in its circumstances, and the authorities cited by Mr. Richards, shewing what act will determine a bailment, and the consequence of the bailment being determined, do not seem to apply, because it cannot, we think, be said that there was any bailment here.

The timber had been all furnished in pursuance of the terms of the agreement, and no doubt with the intention that it was to be used in constructing the building. It seems the building, when it had been proceeded with to a certain extent was blown down, and the design of completing it was abandoned. Any timber that had come from the plaintiff, and had not been applied to the building, ought, of course, to have been given back to the plaintiff, if he had been willing to receive it, or it should have been accounted for by the defendant to the plaintiff; but that does not settle the legal question, who had the legal property in the timber while it was lying on the ground, having been delivered by the plaintiff to the defendant on the terms and for the purposes of this agreement. In our opinion it was

the defendant's timber, taken in part payment of the price he was to have for putting up the building; for the defendant had bound himself *to take in payment* £250 in materials, or such quantity as the building should require: which, we think, means that he was not bound to take so much as £250 worth of materials unless the building should require it, not that any materials which the plaintiff should furnish, and which he did not reject, should revert to and belong to the plaintiff, unless they were used in the building.

We are of opinion that the rule must be discharged.

Rule discharged.

SIDNEY ROAD COMPANY v. HOLMES AND DAVIS.

Bond—Non-execution by one of three obligors named—When a defence for co-surety—Variance—Pleading.

The plaintiffs sued defendants H. & D. as having jointly executed a bond to secure payment of rent by H., which being set out in the plea, it appeared that T. was also named in it as obligor, but had not executed. It appeared that at the execution of the bond T. was not present, and defendant D. told the plaintiffs that he could not conveniently attend, but would sign it at any time. T., however, afterwards, on being applied to by the plaintiffs, refused to execute, and no objection had been made by D., although aware of the refusal.

Held, that the non-execution by T. was no defence under a plea of *non est factum* by H., as shewing a variance between the bond declared on and that set out.

Held, also, that under the circumstances D. was not relieved from liability by T. not having executed the bond.

The plaintiffs sued these two defendants, charging that they, by their bond, became bound, and each of them, their heirs, &c., to the plaintiffs in £500, subject to a condition—after reciting that Holmes had rented two gates on the turnpike from the plaintiffs for a year from the 4th of April, 1856, for £379, payable as therein mentioned—that if Holmes should pay the said rent according to his undertaking, then the bond should be void; and a breach was assigned in non-payment of the rent by Holmes.

The defendant set out the bond thus: "Know all men, &c., that we, James Holmes, of, &c., and one George Taylor and Richard Davis, of, &c., yeomen, are held and firmly bound to the Sidney Road Company, their successors, &c., in the penal sum of £500, of lawful money of Canada, for which payment well and truly to be made, we bind ourselves,

and each of us, our heirs, &c., firmly by these presents, sealed with our seals," &c. In the condition after reciting the terms of the lease of two toll-gates demised to Holmes, it was stated, "And whereas it was provided by the condition of sale that the said above bounden James Holmes should furnish the said company with satisfactory security for the due performance of his part of all and every the said conditions mentioned on his part to be done and performed, and that the said company have agreed to accept the above bounden George Taylor and Richard Davis as such security; and then it was stated to be the condition, that if James Holmes should perform all the stipulations therein specified the bond should be void.

The defendant Holmes pleaded—1st, That the said supposed bond was not his deed.

2nd. Richard Davis pleaded that he signed the bond mentioned in said declaration under an agreement with the plaintiffs, that George Taylor, mentioned in the said bond, should sign his name afterwards, and before his, Davis', name in the bond; but that Taylor did not do so, and thereby the plaintiffs deceived him, Davis, in this, that they procured him, by false allegations and misrepresentations, to sign the same, under the pretence that they would procure the signature of the said Taylor to the bond, and that, by reason of such false allegations and misrepresentations practised by the plaintiffs, the said bond, so far as it related to the said Richard Davis, became void.

Defendant Holmes and Davis both pleaded performance of the condition.

The plaintiffs took issue on all these pleas.

At the trial at Belleville, before *Richards, J.*, it appeared that the bond was drawn up to be signed by Holmes, Davis, and Taylor, as obligors, conditioned to pay to the plaintiffs £389, in four quarterly payments of £97 5s. each. It was executed on the 21st of April, 1856, by Holmes and Davis. Taylor was not present at the time. The president of the Sidney Road Company enquired where he was, and was told by Davis that he could not conveniently attend, but would sign it any time. Davis made no difficulty about executing

without him, taking it for granted, probably, that Taylor would become party to it, but Taylor, when applied to afterwards, refused to execute the bond. He had been security with Davis for Holmes in a similar bond in 1855, and Holmes told him in the spring of 1855 that he had put his name in the bond for 1856, but Taylor told Holmes that he would not sign it until he had paid up some arrears due by him on his former bond. Holmes did afterwards pay up these arrears, but Taylor learned that he was still more in arrear for the current year, and on that account he declined to become a party to the present bond. He swore that he had no conversation with Davis about it: that he had been afterwards asked to sign the bond by the president of the company, and by their attorney, but he declined, unless the plaintiffs would engage not to collect any sum from him.

It was objected at the trial, on the part of the defendants, that two of the three obligors named in the bond could not be sued jointly.

2nd. That the bond varied from that set out, being only the bond of Holmes and Davis.

3rd. That the bond was wholly void, being executed by two only of the three named in it.

Leave was reserved to move for a nonsuit on these grounds

O'Hare obtained a rule *nisi* accordingly. He cited *Bac. Abr.* "Obligation" D. 4; *Co. Lit.* 283 *a*; *Adams v. Bateson*, 6 Bing. 110; *Bull N. P.* 172; *Pigot's case*, 11 Rep. 27.

Henderson shewed cause, and cited *Underhill v. Horwood* 10 Ves. 212, 216-225; *Elliot v. Davis*, 2 B. & P. 338.

ROBINSON, C. J., delivered the judgment of the court.

There is nothing, we think, in the first two exceptions. The case of *Cabell v. Vaughan* (1 Saund. 291) and the authorities cited in it, shew that it will not be presumed that Taylor executed the bond merely because he is named in it, and that the plaintiff were at liberty to treat it as the bond of Holmes and Davis only. If Taylor had in fact executed it, and these defendants desired to take exception on account of his not being joined in the action, they should

have averred that Taylor also sealed and delivered the bond, and pleaded in abatement.—Cro. Eliz. 355 ; Co. Lit. 283. South v. Tanner and Jones (2 Taunt. 254) is a stronger case in favour of the defendants than the present, as regards the issue upon *non est factum*, for there the plaintiff sued two upon a bond, which the declaration stated had been executed by three, and the court held that it was no ground of nonsuit, upon the plea of *non est factum*, that another had executed as well as the two defendants, since it was not the less their deed.

The only point to be considered is, whether the defendant Davis was entitled to succeed upon his third objection: in other words, whether his second plea was in substance proved.

In our opinion it was not proved, not because it is always necessary to shew actual intentional fraud in support of a plea of this description, for there are no doubt many things which the law will not permit, but holds to be in the eye of the law fraudulent, and treats as such, on account of their tendency to produce the same consequences as actual fraud, although nothing false or dishonest was intended. There is nothing, however, to bring the present within that class of cases.

According to the common course of such transactions, it did not rest with the road company to hunt up sureties for the toll-keeper, or to procure or persuade people to execute the bond in question. What they had to do was to accept the sureties and the bond, if they were satisfied with them. If Davis, when he went to the defendants to sign the bond had said or done anything to shew that he relied upon the company for seeing that Taylor also executed it, and that he only signed on the understanding that they were to do that, then there might have been some colour for pleading such a plea as Davis has pleaded, and especially if it were in any degree the fault of the company that Taylor did not afterwards execute; but, according to the evidence, Davis went there with an excuse for Taylor's absence, telling the president that he could not conveniently come then, but would attend at any time to execute it, and he signed it without making any difficulty, leaving space above his name for Taylor's. Then it was no fault of the company that

Taylor did not afterwards execute ; there was no neglect to call upon him ; he was applied to and refused, for reasons which he stated, and which it must be owned were not insufficient. It does not seem very likely that Davis was ignorant that he had declined, and if he did know it, but took no steps in consequence, and let all rest as it was, that would in a court of equity have told strongly against an application of his, made afterwards, to have his bond given up to him. There really is not in truth any foundation for such allegations of false representations and deception on the part of the company as are set forth in the plea, and in our opinion there is nothing in the evidence to support any defence of the nature pleaded in a court of law.

In *Underhill v. Horwood* (10 Ves. Junr. 212, 225, 228), the facts were much like the present. A bond had been prepared, by which six persons named in it were to be jointly and severally bound, but from some accident one of them (Smith) could not be got to execute it, and the bond was executed by the other five; and one Giblett, a person not named in that bond, executed a separate bond with a similar condition. In that case, as in this, the circumstance of one of the obligors named in the bond not having executed was accidental, or rather did not arise from any fault of the obligors. Lord *Eldon*, in discussing the consequences of non-execution by one of the persons named in the bond as obligors, seems to have thought it very clear that the bond, as it was executed, was not the joint bond of the five, but that the five were severally bound by it, the bond being in its language a joint and several bond. "I had a notion," his lordship said, "which I think was not correct, that when a man executes a bond, meaning that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. In such a case, however, unless there is something special, the man who had become so severally bound has a right to have that bond delivered up, for his intention was, not to become a mere several obligor, but to be a joint and several obligor, and the rights are different, both in law and equity; for if he is only a several obligor he has no remedy over against any one; but if he is a joint and several obligor, or

only a joint obligor, there is a right of contribution against the other sureties in equity."

I am not sure that I perceive the ground on which his Lordship held that the bond in the case before him was not the joint bond of the five, as well as their several bond, for those only who execute the bond can be considered as speaking in the words of the bond. Perhaps what his lordship meant was, that as the words to which each executing party set his hand and seal imported that he was bound jointly with five others, he could not be held liable as upon a joint contract with four others, an account of the variance that would appear between the declaration and the bond when produced; and yet the plaintiff would be in the same situation in such a case as in any case in which he is proceeding against two obligors as joint contractors, omitting all mention of a third who has executed the bond, as he may do when he is out of the jurisdiction of the court. The never having executed should in reason be as strong a warrant for omitting all mention of him as his absence from the jurisdiction, and the effect upon the interest of the others is the same in both cases. What I have been now saying applies to the two first objections, which, as it appears to us, are disposed of by the cases of *Hollingworth v. Ascue* (Cro. Eliz. 355) and *Cabell v. Vaughan* (1 Saunders 291, notes 1, 4) and the authorities cited in 291 c. note e, and 291 d. note f, which in our opinion shew that the objections are not tenable which are founded upon a supposed fatal variance between the declaration and the evidence upon the issue on *non est factum*. And as to the last objection, in our opinion the plea of fraud was pleaded consistently with the facts of the case, which would have been a good defence, on the ground of the bond not having been executed by Taylor.

Whether, under circumstances such as existed in this case, the defendant could have applied with success to a court of equity to have his bond given up to him, as suggested by Lord *Eldon* in *Underhill v. Horwood*, we need not consider in this court. We apprehend he could not, if in fact, after knowing that Taylor had not executed, he was content to

allow Holmes to go on as lessee of the tolls, without giving notice to the company that he would hold himself released from the bond unless some good security should be provided in Taylor's place.

The rule for nonsuit, we think, must be discharged.

Rule discharged.

PARSONS V. JONES.

Pleading—Promise to one of several debtors—Statement of consideration—Promissory note.

The declaration set out as inducement certain facts, by which the defendant, with C. and Y., became liable to pay the plaintiff £60; and alleged that in consideration thereof the defendant, by an instrument in writing, promised the plaintiff to pay her the same.

Held, on demurrer, declaration good, for, *first*, it was in effect a statement that defendant made his promissory note, and if so, no averment of consideration was required; and, *secondly*, if not a promissory note, the consideration stated was sufficient.

Declaration, that the defendant and one C. and one Y., being indebted to one H., in the sum of £60, and the said H. being indebted to the said late Benjamin Parsons in the like sum of £60, the said defendant and the said C. and Y., in consideration that the said H. would release them, the said C. and Y., from the said debt of £60, and that the said late Benjamin Parsons would release the said H. from his said debt of £60, and that the said H. would give his order on the said defendant and C. and Y., in favour of the said late Benjamin Parsons, they, the said defendant and C. and Y., then undertook and promised to pay to the said late Benjamin Parsons the said sum of £60 so due to him by the said H.; and the plaintiff says, that the said late Benjamin Parsons did release the said A. from the said debt of £60 so due by him to the said late Benjamin Parsons, and the said H. also released the said defendant and C. and Y. from the said debt of £60 so due by them to the said H., and he, the said H., also then gave his order on the said defendant and the said C. and Y. in favour of the said late Benjamin Parsons, and thereby requested them, the said defendant and C. and Y., to pay the said debt or sum of £60 to the said late Benjamin Parsons: by means of which said several premises the said defendant and the said C. and

Y. became liable to pay the said debt or sum of £60, so due and payable to the said H., to him, the said late Benjamin Parsons, and being so liable then promised the said late Benjamin Parsons to pay him the same during his lifetime, and the same remained due and payable as aforesaid at the time of the decease of the said late Benjamin Parsons; in consideration whereof the said defendant, afterwards, to wit, on the 3rd of August, 1852, by an instrument in writing, promised the plaintiff, as such executrix as aforesaid, to pay her the same, but has not paid the same.

Demurrer.—The causes assigned were, that it appears that the original promise to the said Benjamin Parsons was by defendant and the said C. & Y. jointly, and that the subsequent promise, alleged to have been made by defendant alone, to pay the whole debt, was, for all that appears, without consideration; that the declaration is against defendant alone upon a contract, which upon the face of the declaration, appears to have been made by defendant and others jointly.

C. Robinson, for the demurrer, cited *Add. Con.* 13; *Lyth v. Ault*, 7 Ex. 669; *Lechmere v. Fletcher*, 1 Cr. & M. 623; *Cabell v. Vaughan*. 1 Saund. 291 *b*; *Ch. Plg.* I, 53, 299; *Hemmenway v. Hickes*, 4 Pick. 497.

Hector Cameron, contra, cited *Rice v. Shute*, 5 Burr. 2613; *Thompson v. Percival*, 5 B. & Ad. 925; *S. C.* 3 N. & M. 167.

ROBINSON, C. J.—I think this declaration is sufficient. The plaintiff sets out a history of the transaction, by way of introductory matters, shewing how it was that defendant came to make the promise sued upon. That is mere inducement, and was unnecessary, if the defendant upon that inducement made his promissory note to the plaintiff for the money. The declaration seems to us to amount to a statement that defendant did, on the third of August, 1852, in writing, promise to pay the plaintiff, as executrix, &c., sixty pounds. That would be a promissory note, for we are not to conclude it to have been a promise under seal, since that is not stated. The words “for value received” need not be in the declaration,

or in the note. It does not appear whether the writing sued on contained any such recital of the inducement to the promise as is set out in the declaration. There was no necessity that it should; and if it did, it would not make the writing less a promissory note. I do not take it to be substantially necessary that the declaration on a promissory note should state that the defendant *made his promissory note* in writing, though such is the form commonly used and sanctioned by our rules of court. If it states an undertaking which the law holds to be a promissory note, we may, I think, on the pleading, treat it as a promissory note. As stated, it is a promise by one man to pay another a certain sum of money, absolutely—that is, without contingency—and it is due on demand, no day of payment being named.

But if we could hold the declaration not to be sufficient in substance, as a declaration upon a promissory note, for want of the written instrument being called in terms a promissory note, still the declaration states a good cause of action upon a promise which would be binding, even admitting that the consideration was not stated in the writing, for that is only necessary when the case comes within the Statute of Frauds, which I think this promise does not, for, according to the statement in the declaration, it is not what is called a naked promise to pay the debt of another, but a debt of the defendant's own; and though it is true that others were jointly bound with defendant originally for the same sum of money, yet the whole amount was nevertheless due by the defendant. A perfectly good consideration was proved, and there was no necessity, I think, for stating it in the writing, but it might be shewn *aliunde*.

So that, whether we take the declaration to be upon a promissory note or not, it states, I think, a promise *prima facie* valid and binding.

In my opinion, therefore, the plaintiff is entitled to judgment on the demurrer.

MCLEAN, J.—This action is brought on a joint undertaking of the defendant and others, as appears on the face of the declaration; and it is alleged that the debt was due the late

Benjamin Parsons at the time of his death, in *consideration whereof* defendant, by *an instrument* in writing, promised the plaintiff as executrix to pay her the same. The grounds of demurrer are, that the original promise is alleged to have been to the testator by defendant and others jointly, and the promise to plaintiff as executrix is alleged to be by defendant alone to pay the whole debt; and the latter, for aught that appears, without consideration: that the declaration is against defendant alone, on a contract which, by the declaration, appears to have been by defendant and others jointly.

If the defendant as executrix alone promised to pay to plaintiff the joint debt of himself and others, I can see no sufficient reason why he should not be liable in an action on his several undertaking. The case of *Lyth v. Ault* (7 Ex. 669) shews that where one debtor is *accepted*, and becomes individually liable for a *joint* debt of himself and others, the joint undertaking is discharged, and the action must be on the several undertaking. Here the defendant was liable with others to the testator, but has made himself individually liable to the plaintiff. He of course could do so, and his doing so cannot be said to be without consideration, inasmuch as he was liable for the debt, and the whole might be collected from him. He may sue the other parties to the joint undertaking, and recover the amount of their several contributions, as he could if they were sued jointly, and he paid the whole amount. If there has been no several undertaking by defendant, he can only object to the non-joinder of others by pleading in abatement.—1 Saund. 291; Cowp. 832; *Rees v. Abbot* (2 Black. 947); *Whelpdale's Case* (5 Rep. 119; *Rice v. Shute* (5 Burr. 2611); *Evans v. Lewis* (Exch. E. T. 1794.)

BURNS, J., concurred.

Judgment for plaintiff on demurrer.

WILSON V. GATES.

Construction of instrument—Promissory note or specialty.

£50 0s. 0d.

For value received we jointly and severally promise to pay to W. P. Osborne or bearer, the sum of fifty pounds currency, in manner following, &c., &c.

As witness our hands and seals, this 29th day of April, 1856.

Signed, sealed and delivered,
in presence of

M. M. PATMAN. [L. S.]

E. H. GATES. [L. S.]

RICHARD SMITH.

Held, clearly not a promissory note, but a specialty.

The declaration in this case was upon a promissory note, dated 29th April, 1856, made by the defendant, payable to W. P. Osborne, or bearer, for £50, by the following instalments: £12 10s. on or before the 1st of August ensuing the date, and the remaining sum of £37 10s. in three equal instalments of £12 10s. every six months thereafter, with interest thereon respectively, and by Osborne to the plaintiff transferred, assigned and delivered; and the plaintiff claimed the second and third instalments.

Plea.—Non fecit.

At the trial, at Simcoe, before *Burns, J.*, the instrument upon which the plaintiff declared, when produced, was found to be in these words:

“£50 0s. 0d.

“For value received, we jointly and severally promise to pay to W. P. Osborne or bearer the sum of fifty pounds, currency, in manner following: that is to say, the sum of £12 10s. currency, with interest thereon from date, on or before the first day of August next, and the remainder of the said principal sum, amounting to £37 10s., in equal payments of twelve pounds ten shillings currency, every six months thereafter, with interest thereon, as the said payments respectively become due, until the whole is paid.

“As witness our hands and seals, this twenty-ninth day of April, A.D. 1856.

“Signed, sealed and delivered
in the presence of

M. M. PATMAN. [L.S.]

E. H. GATES. [L.S.]”

RICHARD SMITH.

The learned judge reserved leave to the defendant to move to enter a nonsuit, if the court should be of opinion the instrument was not a promissory note, and a verdict was taken for plaintiff for the two instalments claimed.

McMichael obtained a rule *nisi* to enter a nonsuit, or for a new trial, to which

M. C. Cameron shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We cannot hold this instrument to be a promissory note. It is not a simple contract, but a specialty, and must be sued on as such. The case of *Whittier v. McLennan* (13 U. C. R. 638), is binding upon us at least, and this is a stronger case against the plaintiff, for here the parties executing expressly say, at the foot of the instrument, that they have sealed it.

Rule absolute for nonsuit.

HELLIWELL V. TAYLOR.

Pathmaster—Notice of action—Proof that defendant acted bona fide—14 & 15 Vic., ch. 54, sec. 9.

In this case the defendant being pathmaster, and assuming to act as such, moved the plaintiff's fences, the effect of which was to take off land from the plaintiff's lot and add it to the defendant's. It was left to the jury to say whether defendant acted *bona fide* in the execution of his duty, and they having found that he did, the court refused to disturb the verdict.

TRESPASS to part of the east half of lot 14, in the 2nd concession from the bay, in the township of York.

Pleas.—1st. Not guilty, by statute, marking in the margin statute 14 & 15 Vic., ch. 54, secs. 2 and 5. 2nd. That the land was not the plaintiff's. 3rd. That the land was the defendant's. 4th. Leave and License.

At the trial, before *Burns, J.*, at the last assizes held at Toronto, the facts appeared as follows: in the year 1832, in consequence of the difficulty of making a road upon the allowance for road, that is, the concession, the inhabitants desired that a road should be laid out to connect a road called the Don Mills road, being the road up the river Don to Helliwell's Mills, with the concession line east of the line so impassable. A road was laid out by Mr. Gibson, the surveyor, and this road he placed on the east end of the lots, on the line between lots 14 and 15, and taking 33 feet from each lot for the road. At that time he did not survey the

boundaries of the lots, but placed the road between those two lots according to the fences as they then stood. Part of the land was still then covered with wood, and the road, as people travelled it, was not altogether straight. The road was confirmed by order of sessions, and properly established. Of late years the line between Nos. 14 and 15, as held by the respective owners of those lots, had been disputed, and the proprietors of lot 15 contended that the line was further south than had been supposed. The defendant, with other persons, who were the owners of lot 15, and some two years ago they had an arbitration respecting a portion of the line, and the award was in the defendant's favour. The defendant had been pathmaster for the last two years for that part of the township, and the road in question was within his division. He regularly qualified himself as pathmaster, and the township council placed in his hands moneys to be expended on roads in his division. In the fall of 1856 the defendant caused the plaintiff's fences to be removed 33 feet further south than they had been, and in October or November, 1857, to be again removed 33 feet still further south, thus making the road the breadth of a chain further south than it was formerly, and in doing so, if the correct division line between lots 14 and 15 were as the defendant contended it was, then 33 feet of that chain would be off lot 14, and 33 feet from lot 15. After the award made between William Helliwell and other parties, the road was opened voluntarily in accordance with what defendant contended for in this case, but the plaintiff refused to remove his fences, and to make the road straight. The defendant put up notices, signed by him as pathmaster, directing all parties to remove their fences, and before removing the plaintiff's fence he sent a notice to him to the same effect. The fences not being removed on the plaintiff's part of the line, the defendant did it by and with the statute labour, and ploughed and ditched the ground, and rolled it and prepared it for using as a road, and expended township money upon it. The defendant and his brothers would be the gainers of the old road—that is, one chain wide—as being part of lot 15, if the new road

were established as the correct place to put it; but in laying out and establishing the new road it would follow as of course that the old one might be resumed by the owners of lot 15. At the time of the trial, however, the defendant and his brothers have not taken in that chain of land, but it remained as the old road alongside of the new one.

A few days before this trial, another trial came on between the defendant and his brothers, and one Thomas, in respect of another portion of the line between lots 14 and 15, in which the contest was as to the correctness of the line as it was supposed to have been. The jury in that case affirmed the line as contended for now with respect to the new road, and much of the evidence as given in that case was read from the judges notes by consent, as to the fact of the old road having been laid out upon the ground, &c.

Without going into the question whether the new road should be considered as the legal road or not, under the circumstances, or whether the defendant had a right to move the road without some direction or order on the subject from the township council, the learned judge told the jury to consider first the issues upon the plea of not guilty by statute—that is to say whether the defendant acted *bona fide* as a pathmaster in opening up the new road, and removing the plaintiff's fences, believing he had authority to do so, or whether he did so to serve some purpose of his own, being one of the proprietors of lot 15.

The jury having retired to consider this point, decided that the defendant acted as pathmaster *bona fide* in that character, in doing what he did, and thereupon the learned judge decided that the defendant was entitled to notice of action, and for want of notice being proved, directed the jury to find for the defendant on the plea of not guilty, which they did, and he discharged the jury upon all the other issues.

Eccles, Q. C., obtained a rule to shew cause why the verdict should not be set aside, as being contrary to law and evidence, and for misdirection. He cited *Lidster v. Borrow*, 9 A. & E. 654.

M. C. Cameron shewed cause, and cited *Carswell v.*

Huffmann, 1 U. C. R. 381; Barton v. Bricknell, 13 Q. B. 393.

ROBINSON C. J. delivered the judgment of the court.

The ninth clause of the statute 14 and 15 Vic., ch. 54, in our opinion settles the question which has been raised, respecting the necessity of notice of action, in favour of the defendants. It is not disputed that the defendant, when he did the act complained of, was a pathmaster. It was proved that he assumed to be acting in the proper exercise of his duty in doing that act, but it is suggested that, as the consequence of his removing the fence in question, so as to make the road correspond with what, according to the evidence, appears to be its proper line, would be to add to the land in his own possession, he should be taken not to have acted in the matter as a pathmaster, but as a private individual, with no other object in view than to serve his own interests. There might be a doubt whether that circumstance clearly called upon the learned judge, at the trial, to submit it as a question to be pronounced upon by the jury, whether the defendant did act in the supposed execution of his duty as a pathmaster : but the judge having left that question expressly to the jury, they found that the defendant was acting *bona fide* in the execution of his duty, and the consequence of that is, that the defendant being in fact a pathmaster at the time, he was entitled, upon that finding of the jury, to a verdict of not guilty, although in the act done he may have exceeded his powers or jurisdiction, and have acted clearly contrary to law. This is the provision of the 9th clause of the statute, in its exact words.

We do not hold that it may not in such a case, as well as in others, be put to the court, whether the finding of the jury had anything sufficient in the evidence to warrant it, though the case must be a very strong one which would make it proper for us to differ from the jury on such a point.

But in this case we think the jury judged rightly, and the rule should therefore be discharged.

Rule discharged.

THE BUFFALO AND LAKE HURON RAILWAY COMPANY V.
GORDON.

Buffalo and Lake Huron Railway Co.—Lien for freight—Demand of too much—19 Vic., ch. 21—Effect of.

Replevin for railway iron. It appeared that the iron had been imported from England by the Buffalo, Brantford and Goderich Railway Company, and was shipped from Kingston to Port Colborne, subject to ocean freight, and the freight by schooner from Kingston. On arriving at Port Colborne, no one being ready to pay, the iron was left by the master in defendant's charge, to hold subject to the freight, and was piled on a piece of ground belonging to Government, where other iron owned by the company was also lying, but separate from this. Afterwards the Buffalo and Lake Huron Railway Company (the plaintiffs) bought out the old company under the 19th Vic., ch. 21, and arranged certain writs of *fi. fa.* under which the sheriff had seized this and the other iron; and they thereupon demanded the iron in question from defendant, who refused to give it up, claiming the ocean freight, which had in fact been paid, and the freight from Kingston, as well as demurrage, and some other charges not recoverable. The plaintiff's, however, refused to pay any thing, and replevied.

Held, 1st. That the iron could not be considered as having been delivered to the old railway company, when landed, as it was, at Port Colborne.

2nd. That the statute 19 Vic., ch. 21, did not take away the right of lien; nor could anything done by the sheriff have that effect.

3rd. That defendant having a clear right to detain for the freight from Kingston, of which no tender had been made, his right was not prejudiced by having demanded more than was due.

REPLEVIN for a quantity of railway iron.

Pleas—1st. That defendant did not take the iron. 2nd. That the property belonged to the defendant, 3rd. A lien for forwarder's and shipper's charges for freight, and other charges and expenses, and for defendant's reasonable charges for the care and custody, and for his work and labour in such care and custody.

The plaintiffs joined issue on the first and second pleas, and replied *de injuria* to the third.

At the trial, at Brantford, before *Burns, J.*, the facts appeared as follow: the iron in question had been imported from England in 1855, by the Buffalo, Brantford and Goderich Railway Company. It was shipped at Kingston on the 25th of May, 1855, for Port Colborne, on the Welland Canal, by the schooner "Superior," William R. Taylor, Master, subject to £174 15s. for ocean freight, and charges to Kingston, and the freight due to the schooner from Kingston to Port Colborne, £43 13s. 9d. The shipper at Kingston, at the time the iron was shipped, drew a draft on the secretary of the company for the £174 15s., the charges to Kingston, at three days'

sight, leaving the master of the vessel to collect his own charges of £43 13s. 9d. on delivery of the iron, at the same time expressing on the bill of lading that the iron was subject to the payment of both charges. The vessel arrived at Port Colborne on the 2nd or 3rd of June, 1855, and at that time the affairs of the company had become embarrassed, and no one at Port Colborne was authorised to pay either of the charges, though there was a person in charge of the property of the company at Port Colborne, who would have received the iron from the master of the vessel; but the master would not deliver it without being paid. Near the bridge crossing the canal was a piece of ground belonging to the government, under the management of the Board of Works, and used by persons landing goods to be carried by the railway, and by the railway company for piling their iron landed from vessels bringing it there. At the time the vessel arrived there was a large quantity of railway iron piled up on this piece of ground. The master of the vessel, not being paid, applied to the defendant to take charge of and hold the iron till the charges were paid. He had a wharf, and an office by the side of the canal, and received property to be forwarded, but the iron was not discharged on his premises, but was piled up on the piece of ground under the charge of the Board of Works, distinct and separated from all the other iron lying there belonging to the company. It did not appear that the company paid any rent to the Board of Works, or had any exclusive right to the use of the piece of ground; and after the iron in question was piled up on it the Board of Works leased the said land to another person, to whom the present plaintiffs, after they had acquired title to all the iron lying on that piece of ground, paid a rent for occupying it with their iron, not distinguishing the iron in question, however, from any other. The defendant assumed the charge of the iron, and the captain of the vessel left with him the bill of lading to receive payment. Things remained in this state until the 1st of July, 1856, when the present plaintiffs having completed the purchase of the railway, and the stock and materials on hand, from the old company, assumed to take

possession of all the iron lying on the piece of ground spoken of. On the 28th of July, 1856, the servants of the plaintiffs began to work at the piles of iron on that piece of ground, and towards the end of August began to remove the pile in question, when the defendant forbade them. Disputes were continued about it, until at length the defendant caused a magistrate to interfere, and some of the workmen were committed to gaol. This caused the solicitor of the plaintiffs to pay the defendant a visit to ascertain what it meant. They met about the middle of September, and the plaintiffs' solicitor then claimed the iron, on the ground that the plaintiffs had been put in possession of it, and received possession from the sheriff, the plaintiffs having arranged the writs of *fi. fa.*, under which the sheriff had seized all the iron lying there. The defendant claimed that the iron had been placed in his charge by the master of the vessel, and that there was due upon it the amount mentioned in the bill of lading, with interest upon it, and also £12 10s. for detention of the vessel, some £7 for expenses of piling up the iron separately, and something for himself for taking charge of it. The ocean freight and charges to Kingston, namely, £174 15s., had at that time been arranged, though the defendant had not been apprised of it by the shipper at the time he made the demand. The plaintiffs' solicitor informed him that he knew that such part of the demand had been arranged, and knowing that fact he felt suspicious of the whole claim made by the defendant, and would pay nothing, but told him he would sue out a writ of replevin, and so obtain possession of the iron. Accordingly a writ was sued out, and the iron taken by the plaintiffs. Independent of the claim for the ocean freight, the defendant claimed for the master of the vessel, and other charges, £66 17s. 9d., which comprised the freight, £43 13s. 9d., interest, and other charges. He had been informed, through the telegraph from the shipper, that his charges had been paid, and therefore only claimed the amount of £66 17s. 9d., but the plaintiffs would not pay that, and did not tender any money at all. The deputy-sheriff proved that while the writs of execution were in the sheriff's office, under which the whole quantity of iron had been seized as the property of the old

company, a bailiff had been put in charge, with instructions to say nothing about it, but merely look after it and see that it was not removed. The defendant had informed the bailiff, as he understood, that he claimed a lien upon this particular quantity; and the deputy-sheriff further stated that this particular iron was separated from the other quantities, and that if the defendant had any lien upon it he, did not understand from anything he, the deputy-sheriff, had done with respect to it, that the defendant had abandoned such claim.

It was argued that the effect of the statute incorporating the Buffalo and Lake Huron Railway Company, 19 Vic. ch. 21, was to vest the iron in question in the plaintiffs, to the exclusion of any lien. The learned judge did not consider that the act could be so construed, and left it the jury to say:—1st. Whether there was a delivery in fact to the old railway company of the iron, for if there was, then no lien existed; and 2ndly. Whether the defendant, if in fact he ever had the iron in charge, had abandoned the lien if he had any.

The jury were instructed that it was of no consequence that the defendant had in the first instance demanded a much larger sum than there was any pretence for asking, and though afterwards he abandoned a claim for the ocean freight, yet demanded more than the plaintiffs were bound to pay, as he included the demurrage of the vessel, for the plaintiffs should have tendered what they considered sufficient to discharge the legal claim of the defendant, whatever that might be.

The jury found for the defendant on the plea setting up the lien.

M. C. Cameron, during Michaelmas Term, obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection. He cited 2 Saund. Pl. & Ev. 303; *Dicas v. Stockley*, 7 C. & P. 587.

Freeman, Q. C., contra, cited *Scarfe v. Morgan*, 4 M. & W. 281, *Jones v. Tartleton*, 9 M. & W. 675.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the iron cannot be said to have been delivered by the master of the vessel into the posses-

sion of the consignees, by what took place when the iron was unladen and piled upon the ground, which seems to have been under the control of the Board of Works. That does not seem on the evidence to have been equivalent to putting it into the possession of the old railway company, the consignees. They had not the exclusive possession of that ground, and the iron was not delivered there to any agent or servant of the company, but left in charge of this defendant by and for the master of the vessel which brought it, with instructions that it was not to be delivered up by him till the freight and charges were paid. What right the defendant had to put the iron there need not be enquired into, for it could be a question only between him and the owner, for the time, of the ground. It is sufficient that while it was there he acted as the person having it in his charge, and that the company has not shewn that whatever was standing upon that ground was in their possession. They only used the ground, according to the evidence, as others used it. The iron was all the time, we think, constructively in possession of the defendant, on behalf of the persons entitled to the freight.

Then the statute 19 Vic., ch. 21, cannot affect the question of the right of lien for the charge of this part of the iron to Port Colborne. The old company could not by any act of theirs in transferring the iron to others, destroy the right of lien, and the legislature cannot have intended to give to the act the unjust effect of depriving the carriers of their lien, and enabling the new company to hold it in that respect on better terms than the old company did, from whom they acquired it. It is true that the legislature, in the 18th clause of the act, have been careful to specify some particular claims and incumbrances, to which the property to be handed over by the one company to the other, under the sanction of the statute, must continue to be liable in the hands of the other; but we do not draw from that the inference that the legislature intended to relieve the property from any other legal charges to which it was subject, and would have continued subject in the hands of the former company.

We are also satisfied that nothing done by the sheriff, under the executions which he held, could have put an end to the lien. If he could properly seize and sell the goods while they were legally detained for the charge upon them, he could only sell them subject to the charge, for otherwise he would be selling a better interest in the goods than the owners themselves had, which would be repugnant to reason. As to any waiver of the lien by allowing the plaintiffs to take possession of the iron, it appears from the evidence that this particular iron was piled separate from the other iron belonging to the Buffalo, Brantford, and Goderich Railway; and that none of this iron was suffered to be taken away, so far as the defendant could prevent it. On the contrary, he interfered promptly when that pile was touched.

We do not see any clear right of lien, except for the freight from Kingston, and the charges incurred in landing and piling the iron, and any charge that the defendant may have paid for the storage of it. As to demurrage, if that could be the ground of a lien by the ship owner, we have no evidence of the right to the charge. But it is not necessary to settle that point in this action. It is sufficient if there was any clear right of detention for anything. There certainly was for the freight, and that lien was not lost by the circumstance of the defendant, who as agent was not fully informed of all the facts, having at first demanded the ocean freight, which he saw charged in the bill of lading, but which had been in the meantime settled. He withdrew that charge as soon as the fact was made known to him; but the plaintiffs took upon themselves the risk of absolutely declining to submit to any part of the demand, and insisted on having the property without paying or tendering anything, though the defendant stated to them in detail what charges he felt himself entitled and bound to make. The plaintiffs had the means of judging whether there was any part of the charge to which the defendant was entitled, and should at least have tendered that, but they would pay nothing.

The decisions are rather difficult to reconcile, as to the effect of claiming a larger lien than is due, but the case of *Scarfe v. Morgan* (4 M. & W. 270) appears to settle the law

upon that point in favour of the defendant in this case, for the plaintiffs, it is clear, denied all right in the defendant to detain the goods, and on grounds which must have applied to the whole charge if they applied at all.

In our opinion the rule must be discharged.

Rule discharged.

ELLIOTT V. BUFFALO AND LAKE HURON RAILWAY COMPANY.

14 and 15 Vic., ch. 51, sec. 13—Construction of—Obligation to fence.

Sub-sections one and two of 14 and 15 Vic., ch. 51, sec. 13, are distinct provisions, passed with different objects. The first is to compel the company to fence in *their track*, so that cattle may not get upon it and be injured by the trains : non-compliance renders them liable for *any such injury*, but this clause does not apply until the railway is in use. The second is to provide for the separation, not only of the track, but of all lands taken by the company, from the lands of adjacent proprietors, so that the latter may not be subject to trespasses by cattle escaping from the company's lands ; this clause may apply before the railway is in operation, but not until six months after the company have taken the land, and been requested to fence it.

Where, therefore, a declaration charged that defendants built their railway over the plaintiff's land, but neglected to fence as directed by sub-section one, whereby cattle broke in and destroyed his crops, but it was not averred that the plaintiff had requested them to fence, nor that the six months had elapsed :

Held, that no cause of action was shewn, for the injury was one within sub-section two, and these averments were essential.

APPEAL from the county court of the county of Oxford.

The plaintiff declared that the defendants built and constructed, erected and maintained their railway, over and across certain lands of the plaintiff, being &c., and thereby divided and separated one portion of the said lands from another portion of the said lands adjoining the said railway on either side : and it thereupon became and was the duty of the defendants to erect and maintain fences of the height and strength of an ordinary fence, with openings or gates or bars therein, and farm-crossings of the said railway for the use of the plaintiff, as the proprietor of the said lands adjoining the said railway, of all which the defendants had notice : yet the defendants, not regarding their duty in that behalf, did not for a long time, to wit, for the space of one year next before the commencement of this suit, erect or maintain fences on each side of their said railway, and ad-

joining the said lands of the plaintiff, or with openings, or gates, or bars therein, or farm-crossings of the said railway for the use of the plaintiff, as the proprietor of the said lands adjoining the said railway, but the defendants refused and still refuse to make the same, or any part thereof, whereby the plaintiff hath lost and been deprived of the use of his said land, and the hay, grass and produce thereof growing thereon, or which he might and otherwise would have had, and has been put to great inconvenience and expense in the use and enjoyment of his said land, and divers cattle, horses, hogs, and other animals broke and entered into the lands and fields of the plaintiff, and trampled down and destroyed the grass and crops of the plaintiff.

The defendants demurred, assigning as one of the causes, that the declaration attempts to impose upon the defendants the duty and obligation to fence their railway, for aught that appears upon the face of the declaration, immediately upon taking the land in the declaration mentioned for the use of their railway, whereas in law no such duty arises until within six months after so taking the said land, and unless required by the proprietor of the adjoining lands to fence off their said railway.

The plaintiff joined in demurrer, and after hearing the parties, the following judgment was given in the court below :

McQueen, J.—The plaintiff is, in my opinion, entitled to judgment on this demurrer. The first part of the 13th section of the Railway Clauses Consolidation Act imposes upon the company the duty and obligation to fence their railway as soon as the same is constructed and in working order, without being required to do so by the proprietors of adjoining lands; and that is all that is assumed in this declaration.

If the railway was not constructed, but lands were taken for the use of it, then the second clause of this section imposes upon the company the obligation of fencing off such lands from adjoining lands within six months after the same were taken, if required to do so by the proprietors of adjoining lands; and such, I take it, is the construction given to these two clauses of this section of the act.

From this judgment the defendants appealed.

O'Reilly, Q. C., and *Beard* for the appellants.

D. G. Miller, contra.

This and the next case were argued together.

ROBINSON, C. J.—This company, in regard to their obligation to fence in their railway, and to separate by a fence the land taken by them from the adjoining lands of private proprietors, is placed under the operation of the Railway Clauses Consolidation Act, 14 & 15 Vic., ch. 51. We have to look therefore at the 13th clause of that act, in order to determine the question raised by this demurrer.

The first and second sections of that clause relate to distinct objects, each of which is provided for in a different manner.

The object of the first is to compel the company to fence in their railway track, in order that cattle, horses, and other animals may not be able to get upon it while the trains are running, and so be killed or injured. The object of the second section of the clause is to compel the company to divide not only their railway track, but whatever lands they may take for the purposes of their railway, from the adjacent lands of private proprietors, so that the latter may not be exposed to have their farms trespassed upon, and their crops injured by cattle and other animals coming in upon them from the lands belonging to the company.

These two objects, as I have already mentioned, are perfectly distinct, and the enactments for securing the one and the other are different in their nature, as it is reasonable to suppose they would be. The first section of the clause, which relates to the fencing in the railway, in order to keep cattle off the track, was one that would require to be brought into operation as soon as the locomotives should begin to run; and, accordingly, the duty imposed upon the company by that clause is without any qualification depending upon a request to be made by the private proprietor, and without any privilege of six months, or any other length of time being allowed to them within which they may perform the duty.

It, for instance, they should finish any small portion of their line within two or three months, and begin then to run a train upon it, they would be liable for all injuries done by their trains, or at least for any injuries to cattle which might get upon the track, by reason of their not having properly fenced it in, and made the necessary cattle-guards at road crossings; and this, although no one had requested them to make fences or crossings, and although six months had not elapsed from their having taken possession of the land. The evident intent and effect of the clause is to provide that the railway shall not be used without those precautions.

But so far as regards that first object of the 13th clause, the company will have performed its duty when they have fenced in their *mere track*, and put down their cattle guards, although they may have left a good deal of the land which has been taken by them, either for the purposes of their stations, or generally along the line, open and uninclosed. And this shews that the duties under the first and second sections of the clause are perfectly distinct, and must be kept separate in determining their effect upon the liability of the company.

Under the second section of the 13th clause, the duty is thrown upon the company of separating the lands taken for the use of the railway (that is, the whole of their lands) from the lands adjoining, by a good and sufficient fence to keep off hogs, sheep and cattle. Here the legislature had in view an object not of such general and pressing importance as the other, but one which would better admit of reasonable delay, and which might, without injury to the public, be left unattended to until the respective private proprietors should think fit to request it. Where their lands adjacent to the railway should happen to be uncleared and uninclosed along their other boundaries, they might be indifferent about it and content to allow the company to make the inclosure at their leisure. And as the railway tract itself would be fenced in, in compliance with the first part of the clause, there would be little or no inconvenience to the public in allowing the other duty to be unperformed

for the six months at any rate, and as long after as the respective proprietors may be willing to wait.

Under the first part of the clause the company could not incur any penalty or liability to damage until they began to use their railway.

Under the second part they might, in case of a request made, be in default, and incur liability for damages, at the end of six months after they had taken possession, in case they had been requested to fence, and a reasonable time had elapsed after the request, although it might be years afterwards before any part of their line should be finished and in use.

Now in this action the plaintiff, Elliott, complains of no other injury than the damage done to his crops, and the interruption in the enjoyment of his land, by reason of the company not having put up a proper fence between their railway and his land; and he assumes this duty to have been incumbent upon them from the mere fact of their having constructed their railway, and this not only with a view to protect his cattle from being injured on the track, but with a view to preserving his farm from being trespassed upon; and this, also, without shewing that six months had elapsed from the time of his land being taken from him by the company, and without shewing that he, the plaintiff, had requested the company to separate their land from his by a fence, which, to comply with the statute, must necessarily be placed on the very limit between the two proprietors.

When I say that the declaration does not shew that the six months had elapsed, what I mean is, that no time is laid with certainty, but only a long time "to wit, the space of one year," which does not amount to an allegation of any space of time.

It has been laid down in many cases, that besides the general duty to use ordinary care and circumspection in conducting their operations, the only other obligations incumbent upon railway companies are those which the legislature have imposed upon them. The company in this case would have been under no necessity to erect and maintain a fence between their land and that of the adjacent proprietor,

if the legislature had not made it their duty; and it is not made their duty by the act until request has been made, and, as I assume, a reasonable time after, and until six months have elapsed from their taking possession of the land.

If it had been plainly averred in this declaration, which it is not, that the railway at this point was finished and in use, still the plaintiff could not deduce from that the duty upon the company of separating their land from his, without regard to time, and in the absence of any request, and in order to keep cattle from his crops, without confounding two things, which I consider to be perfectly distinct.

In my opinion, therefore, the plaintiff has not in his declaration shewn what is necessary to give him a right of action for the injury he complains of, and the judgment of the court below should have been for the defendants.

The judgment given must, therefore, I think, be reversed, and judgment given for the defendants upon the demurrer.

BURNS, J.—The judge of the county court appears, in giving judgment for the respondent in the court below, to have adopted the view presented by his counsel to the court; namely, that the two paragraphs of the 13th section of 14 & 15 Vic. ch. 51, were to be read in this way—that the company had six months during which to put up fences, unless requested to do it sooner, but that after six months the duty upon the company was obligatory to fence, or that they would be subject to an action for not doing it. The declaration is framed upon that idea, and therefore the plaintiff claims for loss sustained upon his own land, by reason of cattle, horses, hogs and other animals tramping down the grass and crops.

It is quite clear to me this view is an erroneous one to take of that section. The two matters provided for are distinct from each other, and not the one dependent upon or connected with the other at all. The first provision not only applies to the proprietors of the lands adjoining the railway, but to every one, and until such fences and cattle guards shall be duly made, the company shall be liable for all damages which shall be done by their trains and engines to cattle, horses, or other animals on the railway; and after

fences shall be duly made they shall not be liable for damages, unless negligently or wilfully done. The fencing meant here is as respects the track, and amounts to this—that if the company shall use the track for running locomotives with trains, &c., without fencing in the track, they shall in all cases be liable to every one for a damage done to cattle, horses, and other animals on the track. The company may have lands where offsets may be established, where stations, depots, or fixtures are erected, or goods delivered, &c.; but what is intended by this first provision is, as it appears to me, that whatever lands the company may have adjoining the track, at all events the track shall be fenced in, otherwise the company shall be liable for those accidents provided for which may happen upon the track of the railway. The second provision is of a different description, and that applies solely to the proprietors of lands adjoining the railway. The company is bound to separate and divide their lands from the lands of the proprietors, if the company be requested to do so, but not otherwise; and that division is to be made with a sufficient post, rail, ridge, ditch, bank, or other fence sufficient to keep off hogs, sheep, and cattle.

Before the plaintiff in this case could have any ground of complaint against the company for not dividing and separating their lands from his lands, he should have requested them to fence, and until then the company would not be bound to fence. This description of injury is quite a different one from that which may occur upon the track of the railway; and the provision is, that before the company shall be liable to the owner of property adjoining the railway for injury upon his own land from their not fencing, he shall first have requested them to put up fences.

The declaration, therefore, discloses no cause of action, for it does not complain of any injury to the plaintiff's cattle done on the track by reason of not fencing, and it does not shew that the plaintiff had ever requested the company to fence their lands from his land.

The judgment should be reversed, and judgment given for the defendants.

McLEAN, J., concurred.

Appeal allowed.

FERGUSON V. THE BUFFALO AND LAKE HURON RAILWAY
COMPANY.

The declaration in this case was the same as in Elliott v. This Company, ante page 289, but charged, as additional damage resulting from the same breach of duty, that by reason thereof a steer and heifer of the plaintiff got upon the railway, and were killed by an engine of the defendants running thereon.

Held, bad.

The declaration in this action was substantially the same as in the last, with this additional allegation at the end, "And also, by reason thereof, one steer and one heifer of the plaintiff got upon the said railway, and were killed by a certain locomotive steam engine of the defendants running upon the said railway."

Defendants demurred, on the ground, "that the said first count attempts to fasten the duty of fencing the said railway on the defendants, and to recover damages done to adjoining lands, without shewing any request to them so to do by the plaintiff, whereas no such duty existed until within six months after the taking of lands by defendants for the use of their railway, and if thereunto requested by the proprietor of adjoining lands."

ROBINSON, C. J.—For the reason given in our judgment in the case of Elliott against these defendants, I think the plaintiff in this case has not stated a good cause of action, in that part of his declaration which complains of the defendants for not having erected a fence between their land and his, by reason whereof his crops have received injury. The duty to put up a fence upon the land between the company's land and the plaintiff's, with a view to protect the plaintiff's land from injury, is a different duty from their obligation to fence in *their railway*, in order to prevent horses and cattle from straying upon it; and it could attach only after six months had expired from the time of the company's taking possession of part of the plaintiff's land, and after he had given notice to them that he required his land to be separated from theirs by a fence.

If therefore the declaration, which contains but one count, had stated in that count no other cause of action than that which I have just spoken of, the defendant would, in my

opinion, have been entitled to judgment upon the demurrer, but the same count claims damages for another injury, namely, the killing of a steer and a heifer belonging to the plaintiff, by a locomotive engine running upon the railway while it was unprotected by a fence, such as the statute required the defendants to erect and maintain at all times while the railway was in use. For the neglect of that duty, if the duty itself and the breach of it had been properly declared upon, the defendants would, in my opinion, be liable to damages on account of the injury to the plaintiff's cattle, which is alleged to have arisen from it; because the obligation to fence in the *railway*, so as to prevent cattle getting upon it, is thrown upon the company by the first section of the 13th clause of the 14 & 15 Vic., ch. 51, as soon as the railway is finished and in use, without any qualification as to six months' time, or any necessity for a request by the proprietor of the adjoining lands.

I have stated the distinction in Elliott's case more fully. But though the killing of the plaintiff's cattle furnished a distinct and substantial cause of action, yet it is here expressly laid as an injury arising from the breach of the duty averred in the first count.

I do not see clearly, upon this copy of the pleadings, what the defendants mean, when they speak of the first count. There may have been one or more counts besides, which were not demurred to, and so are not copied in the demurrer books: but certainly all that is given to us here as the declaration forms but one count, charging a breach of duty, and claiming damages for two distinct injuries as arising from it. The defendants demur to the *first* count. I can see no second count; and as the first count states no good cause of action as to the killing the cattle, independently of the duty, and the breach of it, which we think are badly assigned, it follows, in my opinion, that the defendants are entitled to judgment generally upon the demurrer, and the judgment given below must be reversed.

BURNS, J.—The only difference between this case and that of Elliott is, that—in addition to the allegations that by means of the want of fencing the lands of the company from

the lands of the plaintiff, the plaintiff had lost and was deprived of the use of his lands, and the hay, grass, and produce growing thereon; and that divers horses, hogs, and other animals, broke and entered into the said lands and fields of the plaintiff, and trampled down and destroyed the grass and crops—the plaintiff says, “and also by reason thereof one steer and one heifer of the plaintiff got upon the said railway, and were killed by a certain locomotive steam engine of the defendants’ running upon the said railway.”

The doubt I had about this case was whether the demurrer was not too large, for though the plaintiff had no cause of action in respect of the injury to his own lands by reason of his not asserting that he requested the company to fence their land from his, yet he says that a steer and heifer got upon the railway, and were killed; and whether this might not give him a cause of action independently of the other. On reading the declaration, however, carefully, the question is, whether the plaintiff means to assert that it was by reason of the want of fences that the steer and heifer got upon the railway, or was it by reason of the horses, hogs and other animals breaking and entering into the lands and fields of the plaintiff, that they got there. The grammatical reading of the whole is, that the defendants refused to make the fences, whereby the horses, hogs and other animals broke and entered the plaintiff’s lands and fields: and also by reason thereof the steer and heifer got on the railway: that is, that the steer and heifer got upon the railway because the horses, &c., broke and entered the plaintiff’s lands for want of sufficient fences. The want of the fence is not the proximate cause, but the approximate cause of the steer and heifer getting upon the railway. In the case of the horses, &c., breaking into the plaintiff’s lands, the defendants were not bound to fence without being requested to do so; and it would be strange to give the plaintiff a cause of action for the steer and heifer getting upon their railway in consequence of not doing that which they were not bound to do. If the plaintiff has in truth a cause of action against the defendants for the destruction of the steer and heifer, because the defendants were using the track of the railway without its being fenced in as directed, he should bring his action

direct for that injury, and not lay it as a consequence of neglecting to do that which he has not shewn to be obligatory upon the company to do. Besides this objection to the frame of the declaration, it is not asserted that the steer and heifer were killed upon the railway. It is said they were killed by an engine running upon the railway; but it is inferred that the cattle were killed on the railway. The statute is plain, that for want of fences the company shall be liable for damages done *on* the railway. Though this might resolve itself into a special demurrer, if such an objection were taken upon a declaration framed in other respects for the injury sustained by reason of the loss of the steer and heifer, yet it is material to be looked at in a declaration framed, as this is, not with a view of claiming damages resulting from a direct breach of duty to fence in the railway, but as a consequence of an alleged breach of duty in not dividing and separating the lands of the company from the lands of the plaintiff, a duty which the defendants were not called on to perform until request made.

It would not be dealing fairly with the defendants to apply the allegation respecting the steer and heifer to a duty under the act, which the plaintiff did not consider gave a substantive cause of action by itself, as this declaration is framed; and therefore we ought to construe the pleading most strongly against the pleader.

McLEAN, J., concurred.

Judgment below reversed.

HUIST V. BUFFALO AND LAKE HURON RAILWAY COMPANY.

Neglect to maintain cattle-guards—Ox escaping from highway—Liability—14 and 15 Vic., ch. 51, sec. 13.

Declaration charged defendants with neglecting to maintain cattle-guards, by means whereof the plaintiff's ox, lawfully being on the said highway, got upon the railway, and was killed by the train. It appeared that there were no cattle-guards at the time of the accident, and that the ox got from the highway on to the track.

Held, affirming the judgment of the court below, that in the absence of cattle-guards, defendants, under 14 & 15 Vic., ch. 51, sec. 13, were liable, without reference to the question whether the ox was lawfully on the highway or not.

APPEAL from the county court of the county of Oxford.

The plaintiff declared, for that the defendants, before and

at the time of committing the grievance hereinafter mentioned, were the owners of the Buffalo and Lake Huron Railway, which railway, before and at the said time, passed through the township of East Zorra, in the county of Oxford, and crossed on the level thereof a certain public highway in the said township, being the allowance for road between the sixteenth and seventeenth concessions of the said township; and it thereupon became and was the duty of the defendants to have made and maintained cattle-guards at such road crossing, suitable and sufficient to prevent cattle and animals from getting on the said railway; nevertheless the defendants did not, at the several times hereinafter mentioned, make or maintain any such cattle-guards; by means whereof a certain ox of the plaintiff, lawfully being on the said highway, heretofore, and before the twenty-seventh day of May, 1857, got on the said railway, and was then and there killed by a certain train and engine of the defendants, and thereby was and is wholly lost to the plaintiff.

Plea.—Not guilty, by statute.

The case was tried in December last. *Conrad Dench* called for the plaintiff and sworn, said, I know the crossing on the seventeenth concession of East Zorra: the ox was killed on the night between the fifteenth and sixteenth of May: I saw him after dark on the bank of the railway on the fifteenth: there was no fence or cattle-guards at that time: I saw him on the morning of the sixteenth dead: it was dragged along the rail about three rods: he was worth forty-five dollars.

Cross-examined.—He was feeding on the highway: I think he got from the highway on to the track.

Beard moved for a nonsuit, on the ground that it was not shewn that the ox was lawfully on the highway; and a nonsuit was taken on that ground, with leave to the plaintiff to move to enter a verdict for £11 5s.

D. G. Miller obtained a rule to enter a verdict for the plaintiff pursuant to leave reserved, to which *Beard* shewed cause, and thereupon the following judgment was given:

McQueen, J.—The question here is, was the ox lawfully on the highway. The 13th section of 14 and 15 Vic., cap. 51,

provides that the company shall erect and maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway. The same section further provides, that until such sufficient fences shall be duly made, the company shall be liable for all damages which shall be done by their trains or engines to cattle, horses, or other animals on the railway. The obligation imposed upon the company was to have cattle guards sufficient to prevent cattle from getting on the railway, whether straying on the road or not. It was proved at the trial, and admitted, that there were no cattle-guards or fences at the time. That was the fault of the company, and such being the case, does it not follow as a consequence that the company are liable for an accident which happened through their fault? It is contended that the ox was not lawfully on the highway, but was straying; and not being in charge of any one, and being where he had no right to be, there was negligence on both sides, and that therefore the defendants are not liable. *Dovaston v. Payne* (2 H. Bl. 527); and *Jack v. The Ontario, Simcoe and Huron Railway Company* (14 U. C. R. 331) were cited in support of this position. It was on the authority of the last case that the plaintiff was nonsuited, but after a careful re-perusal and consideration of that case, I do not find that the exact point in issue here (was the ox lawfully on the road as against this company?) was discussed or raised there. The case of *Fawcett v. The York and Midland Railway Company* (16 Q. B. 610) not being alluded to either in argument or in the judgment of the court, and not being overruled, but subsequently in the courts in England and here cited with approbation, must be regarded as an authority decidedly in point in this case, and cannot, I think, be distinguished from it in any one feature.

The duty of the company to keep up fences and cattle-guards for the protection of all cattle, whether straying or lawfully being on the road, is absolute; and although the ox, in one sense, perhaps, was not lawfully there, the issue is to be construed as meaning lawfully as between those two parties, the owner of the cattle and the Railway Company. The Railway Company cannot insist on an unlawfulness as

against a third person, who does not interfere (16 Q. B. 618). The rule will be made absolute, for setting aside the nonsuit, and for entering a verdict for the plaintiff for £11 5s., pursuant to leave reserved; and if there is any conflict of authorities upon the point in issue, an appeal will settle the question.

The defendants appealed from this judgment.

Beard for the appellants.

D. G. Miller contra.

The cases referred to are cited in the judgments.

ROBINSON, C. J.—This company, the Buffalo and Lake Huron Railway Company, has been placed by the Legislature under the operation of the General Railway Clauses Consolidation Act, 14 and 15 Vic., ch. 51, as regards the provisions made in the 13th clause of that statute, which are peculiar to that act.

I entirely agree in the opinion given in the court below, that without reference as to how the plaintiff's ox got upon the road, or his right to be grazing along the highway which, not being proved in this case, could not, I think, be presumed, the 13th clause of the statute, which governs this railway in the matter in question, makes the defendants liable for the accident so long as they had no cattle-guards.

The evidence went to shew that the ox got on the track from the highway, and the jury may have come to that conclusion. If they did, then this case would be undistinguishable from *Fawcett's* case (16 Q. B. 616), which case was cited by this court in *Renaud v. The Great Western Railway Company* (12 U. C. R. 421). Though, from the nature, of the declaration, the point now in question did not come in judgment, yet what we there said of *Fawcett's* case was in accordance with the effect given to it by Mr. *McQueen* in his judgment.

I refer also to our judgment in *Dolrey's* case (11 U. C. R. 602). The only other case, I think, which has arisen here upon the same point, is that of *Jack v. The Ontario, Simcoe and Huron Railroad Company*, which was pressed upon the learned judge in the court below, and upon which he ordered the nonsuit, which he afterwards set aside. In

that case it may be that the distinction established in Fawcett's case was not sufficiently kept in view, in some of the observations made in giving the judgment of this court; but there the court were applying the provisions of a different statute, and it appeared, to them to be very material that in that case a gate at the crossing would not, as it appeared, have done any good, as the road itself was not fenced off from the lands adjoining, and the horse, as it was urged, could have got round at either end of the gate if there had been one up. This, however, could hardly be the case if the railway track had been fenced in, as it is required to be in those cases which come within the Railway clauses Consolidation Act.

In comparing any judgment that may have been given in a similar case arising in respect to the Ontario, Simcoe and Huron Railway with the present case, it is necessary always to compare the footing on which the company is placed in the one case by the statute 12 Vic., ch. 196, sec. 18, or any other provision bearing upon that Company, with the enactment which must govern in this case.

I agree fully in the judgment appealed from, and think the appeal must be dismissed with costs.

BURNS, J.—The judge of the county court was quite right in the decision he arrived at in entering the verdict for the plaintiff, but I do not think he has given the correct reason for that conclusion. In allowing the nonsuit in the case of *Jack v. The Ontario, Simcoe and Huron R. R.* (14 U. C. R. 331), it was a misapplication of that case to the pleadings and facts of this case; and then, in correcting the error, the learned judge does it on the case of *Fawcett v. The York and North Midland R. Co.* (16 Q. B. 610), and thinks this court overlooked that case in *Jack v. The Ontario, Simcoe and Huron R. R. Co.* In the case of *Renaud v. The Great Western Railway Co.* (12 U. C. R. 408), we considered the other case as applicable, and decided in accordance with it. The present case charges the company with not having constructed cattle-guards at the public highway, as they were bound to do, by means whereof the plaintiff's ox, lawfully being on the highway, got on the railway, and was there killed by a train and engine. The defendants did not tra-

verse that the plaintiff's ox was lawfully on the highway as stated, but pleaded not guilty, and relied on the statute. Now when we turn to the statute—namely, 14 & 15 Vic., ch. 51—in the 13th section, we find that the legislature has enacted that cattle guards at all road crossing, suitable and sufficient to prevent cattle and animals from getting on the railway, shall be constructed, and until such cattle-guards shall be duly made the Company shall be liable for all damages which shall be done by their trains or engines to cattle, horses, or other animals on the railway. The provision clearly is made to impose the obligation on the Company, in case they choose to run trains on the road before the track was fenced in, and proper cattle-guards constructed, of taking upon themselves the risks of accidents *on* the track. The defendants had not constructed the guards before using the road, and consequently assumed the risk of an accident occurring on the track. The declaration, it is true, is not artistically framed to meet the point, but I think it will do after verdict. The allegation is that the ox was killed by a certain train and engine of the defendants. This, after proof of the fact, will imply that the road must have been in use for a train and engine.

The case, as shewn upon the pleadings and evidence, proves that the defendants have incurred the liability put upon them for using the road without constructing proper cattle-guards at the highway crossing, and being made to pay for risk they assumed they cannot complain.

The judgment should be affirmed with costs.

McLEAN, J., concurred.

Appeal dismissed.

REGINA V. RANKIN.

Highway—4 & 5 Vic., ch. 10—Opening road by district council—Necessity for by-law—Evidence of dedication.

Under the 4 & 5 Vic., ch. 10, the district council could not open a new road except by by-law; and in this case, therefore, no by-law being shewn, it was held that the road was not sufficiently established.

Held, also, that upon the evidence set out below, there was nothing to shew a dedication.

Defendant was tried at the last assizes for the county of Kent, before *McLean*, J., and found guilty, upon an indict-

ment for nuisance, found at the general quarter sessions, and removed into the Queen's Bench by certiorari.

The charge was that defendant, on the 1st of November, 1856, at the township of Dover East, in the county of Kent, "in a certain public road or highway there called the public highway, laid out over, upon, and across lot 20, in the tenth concession of the said township, being the Queen's highway, used for all the liege subjects of our lady the Queen, with their horses, carriages, &c., to pass and repass at their free will and pleasure, unlawfully cut down, felled and prostrated certain trees, &c., upon and across the said highway," &c.

The evidence shewed that lot No. 20 had been an unoccupied lot, until the defendant took possession of it about three years ago.

In 1846 a road was laid out between lake St. Clair and the town line of Chatham, deviating in many places from the concession lines and road allowances, in order to gain dryer ground, the land in that part of the country being generally low and wet. This road left the concession line in front of the lot No. 20, and passed through a corner of the lot, cutting off about three acres, and intersecting a side road between 19 and 20, instead of continuing along the concession line until it reached the side line.

The road was probably carried thus through a corner of the lot partly with a view of saving distance, for the person who was chiefly interested in having the road laid out swore upon the trial that the concession line opposite to this lot No. 20 was not very unfit for a road, and that, if they had been aware of this at the time, they would probably not have gone upon the lot, but would have kept on the concession line.

There were no doubt some steps taken towards establishing this road, which the prosecutor contended for, as a lawful highway. In 1846 a petition to the district council was got up, signed by many of the inhabitants, representing that there might be a fine country between Chatham and lake St. Clair laid open to settlement, if a passable road were laid out, avoiding the public allowances where they were wet and

unfit for travelling; and they prayed the council to adopt a permanent road according to the surveyor's report.

That petition was received on the 13th of may, 1846, and referred to a committee of the council.

Mr. Dolson, a surveyor, had, it seemed, at the request of these petitioners or others, laid out a line of road, to which it was supposed this petition referred, but no report of his was produced at the trial, or could be found among the papers of the council. It was assumed, on the trial, and sworn that he did give in a report of the line of road to the council, such as he had laid out, and the road was actually laid out and blazed where necessary, conforming to his report. He produced a paper, drawn up, as he said, from an old minute of his survey still in his possession, but not exactly corresponding with it. He declared, however, that this minute, and a plan which he produced, shewed the road as he actually laid it out and reported it to the council; that a road was opened upon that line, and statute labour and public money expended upon it, as much as nine or ten years ago, since which time it had been in common use, and was the only road travelled at that point.

In 1846, while the application was pending before the council, several petitions from other inhabitants were presented against it, one of which was signed by the defendant Rankin, who then lived in the township of Dover East, but not upon this lot 20, which he did not then own. These petitions prayed that the public might be confined to the public road allowances, and gave several good reasons against the proposed deviation.

Minutes of the district council were produced, which shewed that the petitions for and against the road were referred by the council to their committee upon roads and bridges, but on the face of those minutes no more particular description given of the proposed road, than that it was to lead from the allowance between the 12th and 13th concessions of Dover to the town line between Dover and Chatham, and there was nothing in the minutes to shew how the application had been finally disposed of.

There was no public document produced, describing the

road, and the description handed in by the surveyor, which he said he had taken from his old minutes, though not exactly following them, did not describe the line of road with any precision.. After tracing it down southerly from the lake St. Clair end of the road to the ninth concession, it proceeded thus: "then running back *about* half the breadth of No. 19 in the 10th concession, taking a south-easterly course till it intersects with a line running east by north to a bridge on the Dover road, north side of Little Bear line; then crossing the bridge, and running north-east along the allowance for road between the 10th and 11th concessions."

There was nothing produced from the records of the council defining the course of the proposed road more particularly, and nothing to specify what the width of it was to be, or on which side of the line the road was to run.

There was verbal evidence of two gentlemen, who had been members of the district council in 1846, that the committee upon roads and bridges reported in favor of the line of road laid down and reported by Mr. Dolson, the surveyor, and that a resolution of the council was passed adopting this report of the committee; but neither the report of the committee, nor the resolution of the council, was produced. They had been searched for, but could not be found.

It was proved that no by-law was passed by the district council for establishing and opening the road, and that nothing further was done than has just been stated, except that on the 9th of October, 1849, when the district council were about to give place to the new institution of county councils, under the statute 12 Vic., ch. 81, a general by-law was passed by the district council, intituled, "A by-law to confirm roads altered, opened, or established by the municipal council of the western district."

This by-law recited that various orders and resolutions had been made by the district council of the western district at divers times, concerning the opening, closing, altering and accepting of roads in the district, and the granting of old, and opening of new roads, and for divers other matters; and that it was expedient that the council should confirm and legalize its own orders and resolutions by by-law pre-

vious to its dissolution; and it enacted that all petitions "and applications for new roads, and alterations or granting of old roads, which have been heretofore by resolution adopted as expedient and necessary by the district council, shall be confirmed and go into effect by the operation of this by-law. And, secondly, that all other orders and resolutions made by the council since the eighth session thereof, and which now require a by-law to give legal effect to the same, be confirmed and go into effect by the legal operation of the by-law."

The road was opened by statute labor in 1846 or 1847, and much statute labor and public money had been expended upon it since.

The defendant seemed never to have concurred in the adoption of the line. He was among those who opposed it by petition in 1846, as has been already mentioned, and becoming owner of the lot No. 20, about three years ago, he felled a tree into the road last autumn, in order to block it up. It was sworn that until lately the inhabitants acquiesced generally in this line of road, which was the only one practicable, but that several others were then obstructing it by fences. It appeared probable from the evidence that it would not be difficult to make a sufficient road opposite to lot 20 upon the concession line, and thus avoid any encroachment on the defendant's land.

The learned judge, at the trial, told the jury that he did not think there was any highway shewn to have been legally established in the place where the defendant was charged with having caused the obstruction; but that, if they found the defendant guilty, he would reserve for the consideration of this court the question whether there had been a highway established on the line contended for, either by the proceedings of the district council, or by the expenditure of public money, and application of statute labor, and the opening and use of the road as a public road.

Harrison, for the Crown, cited 50 Geo. III., ch. 1; 4 & 5 Vic., ch. 10, secs. 39 and 51; *Hodgson v. Municipal Council of York*, 13 U. C. R. 268; *Regina v. Gordon*, 6 C. P. 213.

McCrae, contra, cited *Belford v. Haynes*, 7 U. C. R. 464; *Rex v. Sanderson*, 3 O. S. 103; *Malloch v. Anderson*, 4 U. C. R. 481.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion it cannot be held that a highway has been proved to have been legally established across the defendant's land at the point in question. In 1846, the district council, under the statute 4 & 5 Vic., ch. 10, had the power to open new roads, and alter the direction of existing roads, which power had before been vested in the magistrates under the statute 50 Geo. III., ch. 1.

The council were relieved from the necessity of the formal preliminary proceedings, which the justices had been obliged to adopt; but it is clear, we think, from the 39th and 51st clauses of the statute, that the legislature intended they should proceed by by-law in opening any new road.

"It shall not be necessary," the act says (51st clause), "for the exercise of the said powers, whether in relation to any old road, bridge, or other work connected with any highway, or the laying out, erection or performance of any new road, bridge or work, or to any other such subject as aforesaid, that any report of any surveyor or surveyors of roads should be made to, or directed to be made by, the district council, or that any other formality of any kind now requisite should be observed; nor shall the intervention of any court, or other authority whatsoever, be required *previous to the passing of any by-law* to be made by the district council in any such matter as aforesaid; but such district council may, upon such information and after such inquiry as they may deem sufficient, order and require, by a by-law, that anything be done in any such behalf as aforesaid, which the justices of the peace could have ordered to be done in the same behalf, after the formalities and evidence now by law required in like cases had been observed and adduced: provided, always, that no such by-law as aforesaid shall be contrary to the laws in force in Upper Canada, except where such laws are hereby expressly derogated from, or may be inconsistent with this act."

A very great discretion was given by this statute to the

district council in dealing with the property of individuals, as regarded the laying out roads through their lands, greater than the legislature has thought it prudent to suffer to continue in so unrestricted a form, for they have since subjected the exercise of such authority to various modifications; but the legislature evidently intended that what they were to do in these matters should be done in an open and formal manner by a by-law; and we have determined in other cases that the by-law to be passed for laying out new roads, must be so framed as to make it clear what the precise course of the road is to be, and what space of ground it is to occupy.

Here the new road is not shewn to have been made by by-law or otherwise; and it is hardly necessary to say that the general by-law, passed in 1849, cannot be relied upon as sufficient to authorize the occupation of any man's property.

As to the other points to be considered; referring to the cases in this court of *Rex v. Sanderson* (3 O. S. 103), and *Belford v. Haynes* (7 U. C. R. 464), we think there could be no ground for holding that the defendant in this case had voluntarily dedicated this land as a highway, or that it had become a highway by dedication. We see what the origin of the road was: that it was intended to be established by public authority, without regard to the will of the proprietor. It has either become a road by the authority and acts of the district council, or it is not legally a road at all.

The fact of the public using it for ten years, or expending labour and money upon it between 1846 and the present time, is not sufficient to establish it as a lawful highway, against the will of the owner of the soil, where there is no sufficient ground for presuming a dedication.

It does not seem that the public will suffer much inconvenience by retiring from the defendant's land and following the public allowance; but if it be really an object of public importance that the road should continue to be carried across the corner of the defendant's lot, the right to do so can easily be established by a proceeding of the proper municipality, conducted according to law.

Upon the evidence given we think the defendant ought not to have been convicted, and that judgment should consequently be arrested.

Conviction quashed.

BOYD ET AL. V. MAITLAND.

Wharfinger—Lien—Payment.

In this case, where defendant claimed a lien on certain goods for wharfage, but it appeared that for many years, including the time when these goods came, defendant and plaintiff had been dealing together, and defendant had charged his claim, for wharfage in account current, on which payments had been made from time to time.

Held, that it was properly left to the jury to say whether the wharfage on the goods in question had been paid, and that they were justified in finding that it had been.

REPLEVIN. *Pleas*.—1st. That the goods were not the plaintiffs. 2nd. That the goods belonged to one Hutchinson, and the defendant had a lien upon them for wharfage.

At the trial before *Burns, J.*, at the last assizes held at Toronto, the facts appeared as follows:—The plaintiff's title to the property in question was under a bill of sale made by John Hutchinson, dated 21st October, 1857, whereby he transferred to the plaintiffs property valued at £18,000, and for which he took the plaintiffs' promissory notes. Some question was at first made as to whether the transfer was a valid one, but it was not pressed, and the contest between the parties turned upon the question whether the wharfage on the particular goods replevied had been paid or not.

It appeared that Hutchinson landed his goods at defendant's wharf, and stored many of them in his warehouse, and left them there until he sold them, and when sold gave the purchasers orders to go and receive the goods at the wharf. The defendant purchased goods from Hutchinson, and an account was kept between them. No wharfage was ever paid specifically upon any one article, or upon any one bale of goods arriving, but the defendant rendered bills of the charges sometimes once a month, sometimes once in two or three months, according to circumstances. The defendant's book-keeper stated that the custom between the defendant and Hutchinson was, that the defendant got money himself from Hutchinson when he wanted it, but no credit was ever given to Hutchinson in the defendant's ledger, but kept in a cash book, which the defendant himself kept. The whole charges for wharfage remained at Hutchinson's debit in the

ledger from the commencement to the close of their transactions, and that shewed an account against Hutchinson amounting to £2,088 17s. 10d., extending over several years. At the time of the transfer by Hutchinson to the plaintiffs, there was a misunderstanding between Hutchinson and the defendant as to the state of their accounts. Hutchinson claimed that he had overpaid the defendant, whereas the defendant claimed that Hutchinson owed him a large balance. Hutchinson swore at the trial that he was willing to have their accounts examined by another wharfinger, but the defendant refused it, and he stated that during the year 1857 he had paid the defendant upwards of £280 for wharfage alone in cash, and that during his dealings he kept a running account with defendant, and had more than paid his account, and claimed a balance from the defendant as due to him.

When the defendant found that the plaintiffs claimed the goods which still remained in his warehouse, he made up a bill of the wharfage on these particular articles, which amounted to £66 19s. 7d., extracting them from his former accounts, and he claimed that the plaintiffs should not have the goods without paying that amount. The plaintiffs replevied the goods. The account thus made up shewed that the charge for wharfage extended from May, 1855, to the 19th of July, 1857. The defendant's clerk could not select from the general account, amounting to £2,088 17s. 10d., any item shewing where the £66 19s. 7d. was charged. In fact, the smaller was included with the larger, and the charges must have been rendered in the monthly or three-monthly accounts spoken of, as the case might be; and, as Mr. Hutchinson stated, all these were carried into the general account, and those accounts arranged from time to time.

The defendant contended that he had a right to be paid that sum of £66 19s. 7d., notwithstanding the state of accounts between Hutchinson and himself.

The learned judge left it to the jury to say whether the sum of £66 19s. 7d., made out by the bill produced, and claimed by the defendant, had or not been paid, under the circumstances. He remarked to them there was no necessity

that each item should be proved to have been specifically paid, as the parties did not deal with each other or keep their accounts upon that principle, but if the jury were satisfied that the defendant had assented to all these charges being carried into account, and that Hutchinson had paid, as he stated, that would be sufficient; and that, though defendant disputed something in the account now, that would not enable him to separate charges for articles lying at defendant's warehouse, which had long passed into account between the parties, and on which payments had been made and say that he would resort to that mode of being paid rather than sue for his accounts, and the jury were to say whether they were satisfied that the £66 19s. 7d. was or not paid.

The jury found for the plaintiff.

Eccles, Q. C., obtained a rule, calling on the plaintiffs to shew cause why the verdict should not be set aside, and a new trial granted, verdict being contrary to law and evidence.

M. C. Cameron shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that no fault can be found with the verdict. The defendant was in no situation to dispute the *bona fides* of the assignment made by Hutchinson to these plaintiffs. Then as to the right of the defendant to detain the goods upon his alleged claim for wharfage, the whole course of dealing between Hutchinson and the defendant appeared to be inconsistent with the idea that the defendant had at any time held the goods under a claim of lien. Still, no doubt, he was at liberty to do so, but this seems to have been an attempt on the defendant's part to withdraw from his accounts, which he had repeatedly rendered, some particular charges, which the plaintiffs contend included this wharfage, and which must have done so, if Mr. Hutchinson's evidence was correct. Then whether accounts rendered had been paid or not, or at least so far paid as to leave no demand clearly unsettled for wharfage upon the goods in question, which it seems had been long in store, was left as a question for the jury. The defendant at least cannot

complain of his right to a lien being rested upon that broad footing, for if the charge was paid, he could have no right of action on account of it. It may perhaps be said, with some reason, that from the manner in which the accounts were made, it is difficult to shew conclusively on what particular lots of goods wharfage has been charged and paid, and difficult to trace through the accounts such items as could be shewn clearly to make up the £66 19s 7d. claimed: but the evidence shewed, without room for doubt, that the defendant did make his charges for wharfage items in his current account, through a series of years, including the time when these goods came into his store; and under such circumstances, as there could be no reason imagined why any particular portions of such charges should be left out of the account, it rested rather with the defendant to satisfy the jury that they had not been included, than with the plaintiffs to shew that they were. Unless they had been unaccountably omitted, the jury were warranted in concluding that the payments made from time to time must have covered them.

Rule discharged.

MILLIGAN V. EQUITABLE INSURANCE CO.

Insurance—Insurable interest.

Where the plaintiff had contracted to purchase the property insured, and had failed in making his payments punctually, but was proceeding in equity to compel performance by the vendor:

Held, that he had an insurable interest.

This was an action on a policy of insurance against fire, effected by the plaintiff upon a house of small value.

The case was tried at Belleville, before *Richards, J.*, and turned upon a plea which denied that the plaintiff had an insurable interest in the property. There was no doubt that he had not at any time a legal estate in it. It belonged to a man named Carpenter, from whom the plaintiff contracted to purchase it for £300. He had made a payment, but failed in performing his agreement, not being able to pay the other instalments at the times mentioned.

There was evidence given on defendant's part, to the

effect that the plaintiff had given up all hope of making good his purchase, and had agreed with the agent of Carpenter to continue in the house as tenant, at £15 a-year, and that Carpenter, in consequence, considering the plaintiff's contract at an end, had sold the place to one Oliver.

The plaintiff, on the other hand, called evidence to prove that he had not given up his position as purchaser; but, on the contrary, that a payment had been received from him in that capacity after the time when it was asserted the change in his relation to the property had been made.

A verdict having been found for the plaintiff,

Wallbridge, Q.C., obtained a rule *nisi* for a new trial on the law and evidence, to which

Jellet shewed cause.

Galt supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff, it appeared, had filed a bill in equity to compel Carpenter to perform his agreement of sale; and it has been reported to us by the plaintiff's attorney, who spoke during the argument of the pendency of this suit, that it has since been determined in his favour.

If so, there must be an end to any attempt to disturb the verdict, which at the trial was given in favour of the plaintiff.

Upon the evidence, however, we think at any rate that the plaintiff was entitled to succeed. The case was left fairly to the jury upon the plea denying the plaintiff's interest in the premises, and on a proper explanation of what constituted an insurable interest, the jury found in favour of the plaintiff, as in our opinion they were warranted in doing, for an insurable interest does not mean a perfect legal interest. If it did, there are some buildings on which it would be difficult for any one as owner to effect a valid insurance. The evidence tended to shew that the plaintiff, having contracted to purchase this property, had gone into possession, and was still in possession of it; and though the vendee had assumed to sell over his head, he contended against his right to do so, and insisted that, though not punctual, he had not lost his hold of the property, and could still obtain the bene-

fit of his purchase, being prepared to shew that Oliver had bought with a knowledge of his equitable insurance. Being in possession, and having made payments on account, and maintaining, as the jury thought, in earnest and in good faith his right to make good his interest as owner of the equitable freehold by the aid of a court of equity, he did, we think, stand in that situation which entitled him to insure the property, and to maintain his claim under his policy, otherwise a person so situated, from inability to insure, if he succeeds in what he is contending for, might in the mean time lose by an accidental fire the property of which he is in possession, and to which he may eventually make good his claim. There is no case of a wagering policy, such as the statute prohibits. The jury did not find it proved that the plaintiff had given up his position as purchaser.

Rule discharged.

HATTON V. THE BEACON INSURANCE COMPANY.

Second insurance—Interim receipt—Waiver—New trial.

One of the conditions of an insurance policy was, that if there should be any insurance at any other office notice should be given, and the same indorsed on or stated in the policy, otherwise the first insurance should be void.

Held, that an insurance effected in another office by an interim receipt, was an insurance within the condition : but as there was some evidence of a waiver of the notice required, which defendant could not take advantage of under his replication, the court instead of ordering a nonsuit on the leave reserved, granted a new trial with leave to amend.

This action was on two policies of insurance upon goods in a store. The defendants pleaded (4th plea) to the action on the first policy, that while that policy was in force, and before the fire, the plaintiff procured an additional insurance by means of an interim receipt, to the amount of £500, in the Monarch Insurance Company, to be effected on the same goods, of which additional insurance no notice was given to the defendants, nor was the amount of the said receipt indorsed on the policy sued upon, contrary to the conditions of the said policy.

To the count on the second policy the same defence was pleaded.

The plaintiff in general terms denied the truth of defendant's pleas.

At the trial, at Peterborough, before *Richards, J.*, it was agreed that the evidence given in an action by this plaintiff against the Monarch Insurance Company should be read in this case, and it was admitted by defendants that verbal notice of the interim receipt was given to their agent, and that the agent told the plaintiff that there was no necessity to give a formal notice, until it was known whether the policy would be granted. Each policy was for £500. The condition indorsed on the policy, on which the defence was founded which was stated in the fourth plea, was this: "If there be any assurance at any other office of the property assured at this office, notice of every such other assurance must be given, and the same, with the several amounts thereof, must be stated, either in the policy, or by an indorsement upon it, otherwise the assurance with this office is void, and the assured not entitled to recover, or be paid in case of loss; and in the event of any other assurance with any other office, this company will pay its rateable portion only of any loss," &c. There was no note or entry upon the policy of an insurance with any other office.

The jury found for the plaintiff, leave being reserved to defendants to move for a nonsuit.

Wallbridge, Q. C., obtained a rule *nisi* accordingly. He cited *Dafoe v. Johnstown District Mutual Insurance Company*, 7 C. P. 55.

Eccles, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We cannot hold that upon the evidence and pleadings the plaintiff was entitled to a verdict upon the issue raised on the fourth plea. The plaintiff simply denied that the plea was true; he did not set forth in a replication that the condition was waived. He was in no situation therefore to rely upon the alleged waiver, if it could have helped him.

The condition, that if the assured has another insurance upon the same risk he shall give notice of it, and shall have a note of such other insurance indorsed upon his policy, applies to double insurances subsequently effected, as well as

to any prior insurance. That has been determined in regard to policies framed in the same terms that this is.

Then the next question, which we apprehend was the chief point intended to be submitted to us, is, whether the interim receipt merely, given upon the receipt of the premium by the agent, constituted an insurance within the meaning of the condition. We think it did. The plaintiff was all the time insured under it; that is, he was insured till the company determined upon their agent's report, whether they would accept or reject the risk; and, as they did not reject it, the plaintiff continued insured in that other company, and has in fact recovered from them in consequence of the fire, that is, has recovered their proportion of the loss. We think there was no room for question that the plaintiff's case came within the third condition in the policy, relied upon in the fourth plea; and as no waiver was set up by the plaintiff in answer to the plea, we think the issue should have been found in favour of the defendants.

There should, therefore, in strictness be a nonsuit ordered on the leave reserved, but as it is admitted that the defendant's agent had in fact notice of the subsequent insurance, and being asked to indorse a note of it on the policy, told the plaintiff it was unnecessary, until it should be known whether the company would accept the risk or not, we grant a new trial, on payment by the plaintiff of costs of the former trial, and of opposing this application, with liberty to amend his pleadings. But the plaintiff must consider that, if he cannot prove that after the risk was accepted by the Monarch office, he gave notice to the defendants, and applied to have a note of it indorsed on the policy, there may be no use in his contending further.

Rule accordingly.

LESLIE V. MORRISON.

Agent for sale of goods—When liable on common counts.

Held, that upon the evidence in this case, set out below, the defendant, who had acted as agent for the plaintiff, in selling trees, could not be held liable on the common counts for the trees sold, but must be sued specially for not accounting.

The declaration was for money due by the defendant to the plaintiff, for goods bargained and sold by the plaintiff to

the defendant, and for money received by the defendant for the plaintiff's use.

Pleas.—1st. Not indebted. 2nd. Payment. 3rd. Set off.

The case was tried at the autumn assizes held in Toronto, when the plaintiff had a verdict, which was set aside on account of the rejection of certain letters, notice to produce which had been given, but the notice was not considered sufficient in terms to let in secondary evidence. (See ante, page 130.)

At the last assizes, before *Burns, J.*, the case was again carried down to trial, and the parties by agreement used the judge's notes of the evidence at the former trial, and produced no new evidence, except the copies of the letters not put in at the first trial. The contest originally between the parties was whether the defendant had acted as an agent for the plaintiff in the sale and disposal of certain fruit and ornamental trees from the plaintiff's nursery, or whether he had bought the trees.

After proof of the following document, and the letters, there could be no question that the defendant was an agent. The document signed by both parties was in these words:

“ *Toronto Nurseries,*

July 9th, 1855.

“ Under this date, between Mr. Alexander Morrison, of Toronto, and Mr. Geo. Leslie, Nurseryman, the following bargain was made and agreed upon, in witness whereof both parties have set their names hereto. Mr. Alex. Morrison to act as agent for Mr. Geo. Leslie's nurseries, and to do his best in keeping up the good name and reputation of Mr. Leslie's firm in any part of the Canadas. Mr. George Leslie to supply Mr. Morrison with any trees he may want at the retail prices, and according to the conditions laid down in the general Nursery Catalogue by Mr. Leslie, allowing him a commission of twenty-five per cent. for his trouble on any amounts of goods he may sell, Mr. Morrison giving satisfactory reference to that effect, and covering the amounts with the notes of the purchasers, which he, Mr. Morrison, has to get signed by them at the time of the delivery of the goods. Carriage and freight on all goods to be paid by Mr. Morrison.”

In the spring of 1856 the defendant sent from the country about Chatham orders for trees to be delivered to a great number of persons, amounting to upwards of £200, and he gave directions that the trees should be at the railway station in Toronto on the 7th of April, in order to be forwarded. The plaintiff did not send the trees to the station until the 29th of April, and when they arrived at the west some of the parties for whom they were ordered refused to take them, and the defendant had them planted out upon the farm of a person who consented to it. These amounted to some 150 to 200. On the 13th of June, 1856, the defendant wrote to the plaintiff a letter, in which appeared the following passages: "I would have sent you the notes long ago, but you said to me that I might keep them until I came." "The trees are giving good satisfaction so far." Some correspondence passed between the plaintiff and defendant, and they had some misunderstanding, and a Mr. Johnston called on the plaintiff about it. The defendant, on the 13th of July, 1856, wrote to Mr. Johnston on the subject, and he called on the plaintiff, and left with him the defendant's letter of the 13th of July, and in this letter were contained the following passages:

"Trees came to the Thamesville station on the last of April. I spoke to the man attending at the station to let any one have their trees that came for them. The agent that I employed to deliver them being upon his deathbed, I told the people to go and get their trees, and I would settle with them afterwards. I went on the 15th of May, when I ascertained they had all gone, and got them, except two, Nos. 10 and 13, which would not take them; their objection was that they had agreed with me to get them on the 15th of April, and went to the station on that day, and came home without." "I have got notes in Mr. Leslie's name from all that got, except two, who were not at home; they will give at any time, or pay the money when due."

These expressions were in relation to the quantity of trees sent to the Thamesville station. Another quantity of trees was sent to Ridgetown, and he said, with regard to them, that he employed one Hutchison to sell and deliver all he could, "and what he could not dispose of, to plant them on

his own land. He has acted very honourable in it. There is about 200 planted. They are growing well. I can dispose of them this fall. The loss at Ridgetown will be about £4, besides disappointment to subscribers."

Another lot of the trees were sent to Chatham, and as to these the defendant wrote :

"The trees that came to Chatham I attended to myself. No. 92 mistake, which I discovered after they were gone ; he and some others sent for them. I have not got their notes, but it will be all right."

The defendant put in two letters of the plaintiff, the first dated 18th April, 1857, as follows :

"Your letter of the 25th March came to hand through the Rev. Mr. Johnston, and I have noted its contents, but find not a word about the notes or the money for the trees you got a year ago: this is not according to agreement. You promised to hand me the notes, or leave them in some responsible person's hands for collection after the sale was completed. You could not expect me to furnish any more orders from you until you settled for what you got last year. If you have the notes in your possession, please send them to me by post, or by express, as soon as possible. If you have given them to any one to collect, please let me know who it is. I called on Mr. Johnston. He told me he was going to write to you in a few days. Mr. Fletcher I could not see at home. If you choose you can retain in your own hands notes to the amount of your commission. If the money for the trees is not looked after now, when it is due, one half of it will never be got. If you will send the notes to me, I will pay your commission when the money is collected."

The second letter was dated 20th July, 1857, as follows :

"Your favour, bearing no date, came to hand about a week ago, enclosing notes to the amount of £85 14s. 2½d. Now the amount of the stuff you got from me comes to £202 5s. 3d., from which is to be deducted 25 per cent. off for commission. The balance then due me would be £151 13s. 11d., out which you have only sent me £85 14s. 2½d. The understanding between you and me was, that after the sales you were to deliver up the notes, and to have the twenty-five per cent. commission on the whole amount. Now what I want you to do is, to keep notes to the amount of £50 11s. 4d., which is twenty five per cent. commission, and to send me notes to the amount of £65 18s. 8½d., which is due me

after deducting the £85 14s. 2½., which you sent, from the £151 13s. 11d. If you do not comply with the above, and send the notes immediately, I will be under the necessity of having recourse to law to reclaim what is my proper due."

Freeland, upon this evidence, objected that the defendant could not be charged upon the declaration, framed as it was; but that the action should be special, charging the defendant for not accounting as an agent.

The learned judge reserved leave to the defendant to move to enter a nonsuit on this objection, and the jury, after considering the matter, and what deductions and allowances should be made to the defendant, found a verdict for the plaintiff for £40.

Freeland obtained a rule *nisi* to enter a nonsuit pursuant to the leave reserved. He cited *Wells v. Fisher*, 7 Taunt. 403; Ch. Plg. 7th Ed. I. 362; *Jones v. Brinley*, 1 East 1; *Moore v. Pyrke*, 11 East 52; *Israel v. Douglas*, 1 H. Bl. 239; *McLachlan v. Evans*, 1 Y. & J. 380; *L'Esperance v. Clark*, 4 U. C. R. 12.

Adam Wilson, Q. C., shewed cause, and cited *Hunter v. Welsh*, 1 Stark. 224; *Brown v. Stanton*, 2 Chit. Rep. 353.

ROBINSON, C. J., delivered the judgment of the court.

The court must always regret when it becomes necessary to continue an expensive litigation about a small matter, but it often happens that it cannot be avoided. On the first trial of this case, the defendant having served on the plaintiff a notice to produce documents, called for some correspondence that had taken place between them, on the subject of this action, in order to make out his defence, that he could not be charged as having bought the trees in question from the plaintiff, having only received them to sell upon commission. The plaintiff declined to produce the papers called for, contending that the notice served upon him had not been sufficiently particular in its terms to entitle the defendant to the production of the papers. This objection was sustained, and the defendant in consequence was not allowed to give secondary evidence of the contents of the papers. We found ourselves obliged to hold upon decided cases that the notice

was sufficient, though it was certainly very general in its terms ; and the consequence was that a new trial was ordered, and the case has now for the first time been fully brought out.

The evidence seems to shew very clearly that the plaintiff cannot be allowed to recover on the count for goods sold and delivered, and this we understood the plaintiff's counsel upon the argument to admit. In the face of letters between the parties of such recent date, and an agreement shewing so clearly that the defendant took the trees upon special terms, to sell for the plaintiff on commission, we think we could not hold that the price of the trees could be recovered on the common counts, as for goods sold to the defendant.

The case of *Hunter v. Welsh* (1 Stark. 224), cited by Mr. *Wilson*, supports the principle, that if an agent refuses to account for goods delivered to him for sale, it shall be presumed, after a reasonable time, that he has sold them, and received the proceeds in money ; but this doctrine is thus qualified in *Topham v. Braddick* (1 Taunt. 572), namely, that where the agent has received the goods of his principal to sell for him, and there is no proof that they have been sold, or that, if sold, the agent has received the proceeds, the common count does not lie, but the action must be special for not accounting ; and an action does not lie against an agent for not accounting, until after a demand made of an account.—*Chitty on Contracts*, 6th Ed. 540.

Here the trees were delivered to the defendant upon an express agreement. He was not expected to sell them for money, but was to take notes from the several purchasers. and send them to the plaintiff. There is a considerable balance of the value of the trees not covered by notes received, as the plaintiff alleges. The defendant's excuse is, that that was because a portion of the trees were sent up so late in the spring that they could not be sold, as people were afraid that the season was past for planting them : that he was therefore obliged to have them planted out, and hoped most of them would do well, and might yet be sold. The parties are in dispute about this, but the facts are recent, and must, as it seems to us, be pronounced upon in

an action brought against the defendant upon his special written agreement, or at least in such a manner as will bring up the real question—whether he had acted faithfully or negligently as agent. We strongly recommend the parties to settle the matter by reference to arbitration. The facts could be more conveniently brought out before arbitrators in the part of the country to which the trees were sent.

The rule *nisi* for non-suit in this action on the common counts must, according to our decision, be made absolute.

Rule absolute.

HENDERSON V. CARVETH.

Partnership—Promissory note—Indorsement by one partner of partnership name as sureties—Proof of his authority.

The plaintiff having a claim against M., agreed to give him time, on receiving a good indorsed note, and M. sent him a note, made by himself, payable to W.M. or order, and endorsed by W.M. and by the firm of "J. and J. Carveth." The plaintiff took the note before it was due, knowing nothing of the circumstances under which it was indorsed by the firm, or of the authority of James Carveth, who indorsed it, to use the partnership name. When it fell due, James Carveth being absent from the country, the plaintiff sued the other partner, John.

Held, that he was entitled to recover.

This was an action of assumpsit, by the plaintiff, as indorsee, against the defendant, as indorser of a promissory note for £109 18s. 10d., made on the 2nd of May, 1857, by one Donald Manson, payable to one William Marshall, or order, indorsed by the said Marshall to the defendant and one James Carveth, trading together by the name, style and firm of J. & J. Carveth, and indorsed by them, by the same name and style, to the plaintiff.

Plea, by defendant, that he did not indorse; and issue thereon.

A verdict was taken for the plaintiff for the full amount claimed, subject to the opinion of the court on the following

SPECIAL CASE.

Donald Manson, the maker of the said note, was indebted to the plaintiff in the amount of the same, and the plaintiff agreed to give him time on receiving a good indorsed note, and he accordingly received the note in question from his agent at Port Hope, where the defendant resides.

The defendant, John Carveth, is one of a firm of butchers, carrying on business as such under the style and firm of J. & J. Carveth, and the note in suit is indorsed in the handwriting of James Carveth, in the name of the firm: and he is now absent in England, and was when the suit was commenced. The plaintiff never had any knowledge whatever of the articles of partnership of the defendant and the said James Carveth, and took the note, as above stated, long before it became due.

If the court are of opinion that the defendant is liable under the above state of facts, the verdict is to stand, if not a nonsuit is to be entered.

Helliwell, for the plaintiff, cited *Dally v. Smith*, 4 Burr. 2148; *Musgrave v. Drake*, 5 Q. B. 185; *May v. Chapman*, 16 M. & W. 355.

Galt, contra, cited *Story on Partnership*, secs. 127, 133, notes; *Beals v. Shelden*, 5 O. S. 302.; *Sm. Merc. Law* 43.

ROBINSON, C. J.—I think there is no room for doubt in this case. It is not the case of one member of a firm giving a note in the name of a firm for a debt due by himself alone to the person to whom he gave the note, and with which debt the firm had nothing to do. Here the creditor taking the note must know that that would be a fraud upon the partnership, unless it was done by the authority of the others.

Then Manson owed the plaintiff, but neither of the Carveths did. The plaintiff consequently had no reason to imagine that the indorsement in the name of the firm was placed on the note by one member of the firm in fraud of the others. The objection taken here amounts in fact to contending that a firm cannot become indorsers of a note as sureties for the maker, so as to bind them, unless the payee can shew that all the members of the firm actually authorized the indorsement.

If James Carveth, on being asked in presence of the plaintiff to indorse in the name of the firm as surety for Manson, had then done so, I assume that the firm would not be bound, because the plaintiff would have known that James Carveth, without the authority of his co-partners, had indorsed the note in order to render the firm liable as sureties,

in a transaction which the plaintiff had reason to know had nothing to do with the partnership business; but in this case the note was brought to the plaintiff with the indorsement of the firm upon it. The plaintiff had no more reason to look upon the indorsement as signed by one than by the other. It might have been indorsed by authority of both, as well as by one without such authority, though I suppose we must assume the plaintiff to have known that the indorsement was by way of security, and to give the note credit, and not upon any transaction of the firm.

I am of opinion that the Carveths, carrying on business together as partners in the trade of butchers, could legally make and indorse notes; and if they could, then, though one could not bind the other without his consent in a note by way of security, yet both, I think, could make or indorse a note for such a purpose.

And there is nothing in the evidence to shew that the plaintiff had any knowledge that it was James and not John Carveth who signed the note, or that it was not signed by one in presence of the other, or by a third party with authority of both.

This was no contrivance between two persons to cheat a third.

The questions are: *first*. Could both the partners agree to indorse the note for Manson's accommodation? and if they could, then, *secondly*, Was the plaintiff, who had no connexion or privity with either in the matter, bound to ascertain before he took the note that the signature of the firm was not used by one of them without the sanction of the other?

I find no case nearly resembling the present in its facts, but that of *Ridley v. Taylor* (13 East 75) appears to me to support this action. The note in Story's work on Partnership, sec. 127, makes me doubt whether in the American courts an action under the same circumstances would be supported; but I do not find any of the cases cited by him that are not distinguishable in their facts, and the learned author appears to recognize a difference in the course held by English courts upon the question. It is observable in the present case that there is nothing whatever to shew that the plaintiff knew

anything of the partner from whom the indorsement was obtained or the understanding or consideration on which it was given. The debtor, Manson, and the plaintiff lived in different parts of the country, and Manson sent him this note indorsed by a firm with whom he may have had transactions of business, but of whom, or the members composing the firm, for all that appears, the plaintiff knew nothing.

In my opinion the verdict should stand.

MCLEAN, J.—The defendant, one of the firm of J. & J. Carveth, is sued, in the absence of his co-partner from the province, as indorser of the promissory note mentioned in the declaration. He pleads that he did not indorse, and it is admitted that the indorsement is in the handwriting of the absent partner in the name of the firm J. & J. Carveth. It is not alleged that the indorsement was made by James Carveth in fraud of his co-partner, or without authority to sign the partnership name; and it must be presumed that in putting the partnership name to the indorsement both parties were consenting, at all events till the contrary appears.

The cases cited in the argument—*Musgrove v. Drake et al.* (5 Q. B. 185), and *May v. Chapman et al.* (16 M. & W. 355)—establish that where the holder of a bill for value has no knowledge of any fraud he may recover. The latter case (*May v. Chapman*) indeed goes further, and shews that the plaintiff, even had he been aware that the indorsement was in fact made in the partnership name without authority, might nevertheless recover, if Marshall, the payee, was ignorant or had no notice of that fact, and indorsed it in good faith and for value. If the right of the holder of a promissory note, who has given value for it, were liable to be impeached on such grounds as are urged by the defendant, the negotiability of promissory notes would be seriously affected, inasmuch as it would impose a necessity of enquiry, in all cases where partners are concerned, as to the consideration and the authority to make or indorse a note. It sometimes happens that a partner acts in fraud of his co-partners, by making them liable for notes or acceptances without their authority; but in all such cases an innocent

holder for value is entitled to call on the partnership for payment, leaving the parties to arrange such unauthorized proceeding amongst themselves.

Mr. Chitty, in his treatise on Bills, page 39, 9th Ed., says, that "by the custom of merchants, long established as law, if one partner in trade draw, accept, or indorse a bill, check, or note, in the name, and seemingly on behalf of the firm, such act will render all the partners liable to a *bona fide* holder, although the instrument had no relation to the joint trade, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner." In this case the plaintiff received the note in satisfaction of a debt due to him by the maker. He could not tell what the dealings between the maker and the co-partnership of J. & J. Carveth might have been. The partnership might have been indebted to the maker in the amount of the note; and whether or not, the indorsee was not bound to enquire. The defendant, as his co-partner, if they pay the note, have a right to look to the prior indorser for the amount, or to the maker, if the money is paid for his benefit; but they cannot get rid of their liability by shewing that the indorsement in the name of the firm was not in the course of the partnership business, or that the one partner had no right to indorse in the name of the firm.

In the case of *Beals v. Sheldon et al.* (4 O. S. 303) the note was given in the name of a firm for a debt contracted by the partner, who gave it before the partnership was formed; and the suit was between the payee of the note and the firm, the payee knowing the debt to be contracted only by one of that firm, before the partnership was formed.

It appears to me the plaintiff is entitled to recover, under the circumstances stated.

BURNS, J., concurred.

Judgment for plaintiff.

STEPHENS V. COUSINS.

Replevin—14 & 15 Vic., ch. 64—Detinue—Lien—Pleading.

Where the goods have been replevied under the 14 & 15 Vic., ch. 64, and the declaration is for detaining merely, the pleadings should be as in detinue.

In such an action a lien cannot be given in evidence under a plea denying the plaintiff's property.

Action for 263 bushels of peas, which had been replevied under 14 & 15 Vic., ch. 64.

The declaration stated that the defendant wrongfully deprived the plaintiff of the use and possession of his goods, and claimed a return of the goods, or their value, and damages for their detention. Defendant pleaded—1st. Not guilty. 2nd, That the peas were not the plaintiff's.

At the trial at Toronto, before *Draper*, C. J., the evidence was wholly on the plaintiff's side. The defendant called no witness.

The fact appeared to be, that the plaintiff sent 1900 bushels of peas from Montreal, consigned to one Brown, in Toronto, for sale. They arrived on the 12th of June, 1857, and Brown had from time to time received parcels of them from the defendant, who had stored them upon their arrival in his warehouse. The defendant's charge for storage for all the peas was £147 8d. About the middle of July there remained 263 bushels of peas in the warehouse undelivered. The defendant refused to let Brown have them till he paid a balance, which he claimed as being due from Brown to him on his account as wharfinger. Brown had had previous accounts with defendant as wharfinger, covering many other transactions, upon which he claimed a balance as being due to him of £28 10s.

A quantity of oats of the plaintiff's came at the same time with the peas, consigned also to the defendant. They were stored together, and the charge for the whole was \$193.83.

The defendant, before the plaintiff demanded the 263 bushels of peas, had rendered his account against Brown, in which he claimed a balance of \$114.63, as due to him by Brown on his general account.

Brown, on the other hand, claimed that the defendant then owed him a considerable balance, but nevertheless, as he swore upon the trial, he tendered the sum of seven dollars as the balance of storage which would be chargeable on the 263 bushels of peas yet in store, supposing that the defendant might be entitled to insist upon that.

Brown swore positively that he did tender the \$7, though a witness, whom he took with him to the defendant, stated that he did not see any money tendered, but only saw a paper handed, which was declined.

The jury found for defendant.

Eccles, Q. C., obtained a rule *nisi* for a new trial, to which

M. C. Cameron shewed cause. He contended that this must be taken to be an action of replevin, and that in that action no evidence of a claim for lien could be given, unless it had been specially pleaded. He relied further on the evidence, as shewing that the defendant could have no claim for lien on the peas at the time he refused to give them up; but at any rate no claim beyond what was due for storage of the 263 bushels undelivered. The storage on the oats and peas was charged to separate items in the defendant's account.

ROBINSON, C. J., delivered the judgment of the court.

Under the 9th clause of our Replevin Act, 14 & 15 Vic., ch. 64, we think the pleading in this action, for detaining merely, should be the same as in an action of detinue, and the question then is, whether in detinue the defence of lien may be given in evidence under the plea denying the plaintiff's property in the goods. It is not a defence that can be received under the plea of *non detinet*.

In *Lane v. Tewson* (12 A. & E. 116, note) it was decided to be admissible under the plea denying the plaintiff's property, and we do not find that the law is now clearly held to be otherwise, though the point has been doubted, and *Mason v. Farnell* (12 M. & W. 684) is clearly against it, and is the later authority. We refer also to *Chitty on Pleading*, I. 139, 516.

On the whole, it appears to us that the weight of authority is against the admissibility of the defence of lien under either of the pleas on this record. There should therefore be a new trial without costs; and we must say that upon the facts of the case we scarcely think it is worth the defendant's while to go to a second trial upon amended pleadings, for though, if his right of lien were clear, we do not think he has lost it by allowing part of the peas to be taken out of store, nor that his claim would be confined to the charge for storage upon the 268 bushels only, yet the evidence seems strong to shew that he made his storage charges a matter of general account between him and Brown, in such a manner as to compromise his right of lien, for if credit is given the right to detain is waived, and a wharfinger has no lien for his general balance of account.

Rule absolute. (a)

BUCHANAN V. ANDERSON.

Agreement to saw logs at certain rates payable monthly—Condition precedent—Measure of damages—New trial.

Defendant agreed to saw for the plaintiff a certain quantity of logs, which the plaintiff was to deliver at his mill, at specified rates, which would have amounted in all to £590, and it was stipulated that the money should be paid "in cash, or by a negotiable note, at three months, at the end of each month's work." To an action for not sawing logs so delivered, defendant pleaded that he had sawn some of the logs, but the plaintiff refused to pay him according to the agreement, and that he had recovered judgment for such default, which judgment was still unsatisfied.

Seemle, that the plea formed a good defence.

Quere, as the measure of damage to be recovered.

But as the jury found for the plaintiff, when the plea was in fact proved, a new trial was granted.

This was an action for non-performance of an agreement by defendant to saw certain quantities of logs, which the plaintiff was to deliver at his mill, and had delivered, but which the defendant refused to saw. The defendant pleaded only one plea:—that the plaintiff did draw some logs to be sawed by him under the agreement, and that he sawed them into lumber, but that the plaintiff refused to pay him for sawing according to the agreement, and he recovered judg-

(a) See *Boyd et al. v. Maitland*, ante page 311.

ment against him for such default in paying, which judgment was still unsatisfied.

At the trial, at Toronto, before *Draper*, C. J., it appeared that on the 18th of March, 1856, the plaintiff and defendant entered into a written agreement, whereby the plaintiff undertook to deliver at a saw-mill, of which the defendant was then the lessee, saw logs of pine and hemlock sufficient to produce 385,000 feet of lumber of the description specified in the agreement, which the defendant engaged to saw for the plaintiff according to the specifications.

The plaintiff agreed to pay for the sawing £339 2s. 6d., being at the rate of 17s. 6d. per thousand feet. In the same agreement the plaintiff also undertook to deliver at defendant's mill maple and elm and bass-wood logs, sufficient to make lumber of the quantities and descriptions mentioned in the agreement, for which he was to pay the defendant for sawing certain rates specified. Altogether the defendant would have been entitled to £590 7s. for his work in sawing the different descriptions of lumber, if the plaintiff had furnished all the logs he undertook to do, and if defendant had sawed them all.

The defendant, on his part, agreed to saw all the lumber specified for at the rates named ; and then the agreement concluded thus : " The above sum of £590 7s. to be paid by the aforesaid J. B. to the said W. J. A. in cash, or by negotiable note, at three months, at the end of each month's work."

The plaintiff proved that he had drawn many logs to the mill, which the defendant refused to saw, or neglected to saw, and that the defendant afterwards gave up possession of the mill, leaving the logs there unsawn.

Before this, however, he had sawed about 47,000 feet of the plaintiff's logs, and sent him a bill of his charge for sawing it, according to the rates in the agreement, being £42 14s. 7d. This bill was rendered to the plaintiff on the 21st of May, and the plaintiff on the 12th of June sent to defendant a note of one Paxton, indorsed, as would seem from the evidence, by the plaintiff, which it appeared the defendant

endeavoured to get discounted, but failed, and returned it to the plaintiff, who seemed to have given it back to Paxton.

The learned Chief Justice considered at the trial that the payment by the plaintiff for each month's sawing was not a condition precedent; or rather that the defendant could not desist from going on with the work, because the plaintiff at the end of any month failed to make his payment according to the agreement.

The jury, after hearing evidence respecting the damages occasioned to the plaintiff by the defendant refusing to go on with the work, gave the plaintiff a verdict for £75.

Hallinan obtained a rule *nisi* for a new trial on the law, and evidence, for excessive damages, and for misdirection as to the non-payment by the plaintiff for the first month's sawing constituting no defence, and also as to the rule for measuring the damages under the circumstances. He cited *Grafton v. Eastern Counties Railway Co.*, 8 Ex. 699; 14 Q. B. 728; *Johnassohn v. Great Northern Railway Co.*, 10 Ex. 434; *Feehan v. Hallinan*, 13 U. C. R. 440; *Battishill v. Reed*, 18 C. B. 696; *Yates v. Dunster*, 11 Ex. 15; *Wood v. Bell*, 6 E. & Bl. 355.

Hector Cameron shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The jury were bound to find for one party or the other as to the truth of the plea, leaving it to be afterwards discussed whether it formed a legal defence or not. They did find for the plaintiff, but it cannot be that they meant by that to say that the plea was not proved, for it certainly was. The plaintiff did not pay for the first month's sawing in money, nor did he give a negotiable note, by which we understand his own note, made so as to be negotiable, not the note of any other maker that he might choose, making himself liable secondarily as endorser; and the note of Paxton, which he did offer, he took back again, as it was objected to, and the defendant seems to have got nothing.

We apprehend the jury found for the plaintiff, not because the defendant's plea was not proved, but because they thought that it constituted no defence. That was not the subject for

consideration at *nisi prius*. The jury should have found the fact according to the evidence, which was uncontradicted, and the question whether the defendant was to go on sawing the 500,000 feet of lumber to the end of the time, though what he did do was not paid for at the end of the month, as it ought to have been, was a question that might have been raised afterwards, and should more properly have been raised before by demurrer to the plea. At the trial the jury should have found whether the plaintiff or defendant was entitled to a verdict on the issue.

So we think there should be a new trial without costs. If that were now the question, I think the plea a good one, but see the authorities cited.

As to the measure of damages, it should be, we think, such as the jury found the plaintiff really had sustained, which it would not be easy to estimate. The logs were still the plaintiff's; he had the trouble of drawing them in vain, and would have to take them back, and to some other mill, and the logs might suffer in value from delay.

Rule absolute (a).

NOWLAN V. SPAWN ET AL.

Promissory note—Action against maker and indorsers—Set off—3 Vic. ch. 8.

Held, that in this action, against maker and indorsers of a promissory note, upon a plea of set-off by two of the indorsers, the jury, under the evidence set out below, could do no more than give them a verdict, and could not find in their favour for any sum beyond the amount of the note.

This action was upon a promissory note, dated 25th of November, 1854, for £560, payable one year after date, made by the defendant Philip Spawn, payable to Peter B. Spohn or order, indorsed by him to the defendants Spohn and Start, and by them indorsed, under the firm of Spohn and Start, to the Moores, who indorsed under the firm of E. & J. F. Moore to the other defendants, who under the firm of Burton and Sadleir indorsed to the plaintiff.

The pleas were as follows:

Philip Spawn pleaded one plea, stating that the note

(a). See *Murphy v. Scarth*, ante, page 48.

was made by him for the accommodation of the defendants Spohn and Start, and without any consideration, and the plaintiff when he received it was aware and had full knowledge of the fact, and after the note became due, and before the suit commenced, it was agreed between the plaintiff and Spohn and Start, without defendants' consent, that the plaintiff should give time for the payment of the note from month to month for the period of a year, so long as Spohn and Start should pay interest at the rate of $2\frac{1}{2}$ per cent per month, and in pursuance of the agreement they did pay the plaintiff interest after that rate for six months, without the defendants' consent.

Spohn and Start pleaded three pleas—1st. That they had paid the note. 2nd. As to £137 10s., &c., parcel, that they delivered a note of other parties to the plaintiff in satisfaction of the £137 10s. 3dly. A set-off against the plaintiff.

E. & J. F. Moore pleaded one plea, stating the same agreement set up by Philip Spawn, that the plaintiff gave time for payment for a year, in consideration of Spohn and Start paying $2\frac{1}{2}$ per cent. per month, without the consent of the Moores.

Burton and Sadleir pleaded four pleas, namely—1st. That Burton did not indorse. 2nd. By both, setting up the same agreement before spoken of, to pay $2\frac{1}{2}$ per cent., and that time should be given. 3. By both, that after the note became due, and whilst the plaintiff was the holder, Spohn and Start paid the plaintiff on account of the note £163, parcel, and as to £288 18s., further parcel, the plaintiff became the purchaser from Spohn and Start of certain lots of land, and it was agreed that the amount due on the note should be applied towards the purchase money, and the same was accordingly so applied, and credit given to the plaintiff for the purchase money, £288 18s., and that the note was discharged to the extent of these two sums, viz., £451 18s. 4. That Spohn and Start had paid the note.

The plaintiff took issue on all the pleas.

At the trial, at the last assizes held in Toronto, before *Burns, J.*, the note, on being produced, was admitted, and the interest thereon making the whole £632 16s. The defendant

then went into evidence, and on the part of Spohn and Start bills of costs, which had been taxed, and which were for professional business transacted by them for the plaintiff, were proved, amounting to £105 9s. 9d., a conveyancing bill of £31 11s. 5d., the note spoken of in their plea, of £137 10s., also the price to be paid on the lots, with the interest, £284 15s., and, besides these, various sums of money, in all amounting to the sum of £859 8s. 2d. The account standing this way left a balance in favour of the defendants Spohn and Start of £226 12s. 2d., for which a verdict was rendered in their favour on the plea of set-off, and a verdict in favour of all the other defendants.

Eccles, Q.C., obtained a rule *nisi* to set aside the verdict on affidavits. The plaintiff's affidavit stated that he was absent at the time of the trial, and only arrived in court shortly after the trial was over: that his counsel was not properly instructed how to meet the demand made under the set-off: that as to the demand made for moneys paid to him, the same were not paid on account of the note in question, but to meet the amount of loans made by him to the defendants Spohn and Start; and he annexed various checks to shew this to be so. The plaintiff further stated that at the time of the commencement of this suit Spohn and Start were indebted to him in the sum of £120, and upwards, upon an open account with him in the way of his business, independent of the note: that as to the claim made for the price of the lots, he could not obtain a good title to them: and as to the note pleaded in satisfaction of the sum of £137 10s., it was understood that the plaintiff should credit it when collected, but not until then. The plaintiff denied that he ever agreed to give time for payment, as pleaded in the different pleas of the defendants.

M. C. Cameron shewed cause, on affidavits answering the plaintiff's affidavit.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff's affidavit, as to the wrong done to him by the verdict, is positively and distinctly denied on oath. But on a view of the whole case we grant a new trial on pay-

ment of costs, for the verdict is clearly such as could not be given with a due regard to the enactment in the 3 Vic., ch. 8, sec. 3. The utmost the jury could do legally in regard to Spohn and Start, was to give them simply a verdict, not for any sum beyond the amount of the note.

If the plaintiff's case had been diligently attended to, and the objection taken, there would have been no necessity perhaps for a second trial, and therefore the plaintiff must pay costs.

Rule absolute.

THE BUFFALO AND LAKE HURON RAILWAY COMPANY V BROOKSBANKS.

Buffalo B. & G. R. W. Co.—Sale to plaintiffs—19 Vic., ch. 21—Claim under Division Court executions.

On the 18th of March, 1855, the Buffalo, Brantford and Goderich Railway Co. mortgaged the goods in question to Her Majesty, to secure £15,000; and on the 17th of April, 1855, they executed a second mortgage of the same property to other parties. These mortgages were duly filed. On the 20th of February, 1856, an execution was issued at the suit of Her Majesty for the same debt, on which the property was seized, and afterwards other executions came. The sheriff put defendant, who was a bailiff of a division court, in possession on the 29th of April, 1856, to hold, first, on account of the sheriff, and next on account of several executions which defendant had in his hands from division courts. On the 11th of February, 1856, the Buffalo, Brantford and Goderich Railway Co. sold out to the Buffalo and Lake Huron Railway Co., which was confirmed by the 19 Vic., ch. 21; and that company having arranged the executions, the sheriff afterwards delivered possession to their agent of the property at Brantford, in the name of the whole. Defendant however claimed to hold, notwithstanding, under the division court executions. These executions were all subsequent to the sale made on the 11th of February, 1856, and had expired before the sheriff gave up possession. The plaintiffs (the Buffalo and Lake Huron Railway Company) having replevied from defendant—

Held, that they were entitled to recover.

REPLEVIN, for a quantity of railway iron, cars, &c.

Pleas.—1. That the goods were, at the time when, &c., the property of the Buffalo, Brantford and Goderich Railway Company, and not the plaintiffs'. 2. A justification: that defendant was a bailiff of the second division court of the county of Brant: that one Lynch sued the Buffalo, Brantford and Goderich Railway Company in the second division court, and on the 25th of April, 1855, recovered judgment, and on the 19th of April, 1856, sued out an execution, directed to the defendant as bailiff, and the defendant, in obedience to the warrant of execution, seized and took the

goods; and the plaintiffs claimed title by a conveyance, made to them by the Buffalo, Brantford and Goderich Railway Company after the seizure. 3. A justification, under a similar judgment, obtained by one Knightly, on the 28th of February, 1855, and a warrant of execution sued out on the 2nd of April, 1856, and placed in defendant's hands. 4. Justification, under a judgment obtained by one Stanley on the 30th of May, 1855, and a warrant of execution sued out on the 19th of April, 1856, and placed in the defendant's hands.

At the trial, before *Burns, J.*, at the last assizes held at Brantford, the plaintiff made title under the indenture dated 11th of February, 1856, between the Buffalo, Brantford and Goderich Railway Company, and Robert Hilario Barlow, set forth in the statute 19 Vic., ch. 21, and upon the effect of the statute, and delivery to them of the goods under the following circumstances.

On the 10th of March, 1855, by an indenture between the Buffalo, Brantford and Goderich Railway Company of the one part, and Her Majesty, of the other part, the property in question, with other property, was transferred to Her Majesty, to secure the payment of £15,000, to be made in March, 1856. This mortgage was filed in the office of the clerk of the county court on the 12th of March, 1855, and was renewed on the 7th of March, 1856. By another indenture, dated the 17th of April, 1855, and made between the Buffalo, Brantford and Goderich Railway Company, of the one part, and James Kerby, David Christie, and Myron P. Bush, of the other part, the same property was again mortgaged to the three persons named. This last mortgage was made for the purpose of securing the corporation of the town of Brantford in a loan of debentures to the railway, and it was filed in the office of the clerk of the county court on the 16th of April, 1855, and renewed on the 15th of April, 1856. The sheriff of the county of Brant proved that an execution, at the suit of Her Majesty, against the Buffalo, Brantford and Goderich Railway Company, came into his hands on the 20th of February, 1856, upon which he seized the property in question, with other property, and made an inventory of the same. He stated that from the 20th of February down to May, many writs of execution came into his hands

against the railway company ; and though he seized all the property, yet he never supposed he could make any thing like the amount of the moneys required by the writs of execution by sale of the property, if he could sell it. The execution at the suit of Her Majesty was for the same debt mentioned in the mortgage. The sheriff put the defendant in possession of the property at the Paris station, which was the property in question in this cause, on the 29th of April, 1856, and he said he did so, because he knew that he was a bailiff of the division court, and would look well after the property ; and he was informed at the time that the defendant had various warrants of execution then in his hands against the railway company from the division court, and he placed the defendant in possession to hold the property, in the first place on account of the sheriff, and after that on account of any claim he, the defendant, could or might set up to the property on the warrants of execution in his hands. Things remained in this state until the 28th of June, 1856. The present plaintiffs having obtained their charter on the 16th of May, 1856, and having agreed to make arrangements to satisfy the different demands against the property, the sheriff, being satisfied that the debts would be settled, delivered up the whole of the property to the president of the old railway company, and it was by him at once delivered to the plaintiffs, through their agent, Captain Barlow. The president of the Buffalo, Brantford and Goderich Railway Company was present, and in the presence of the sheriff delivered the property to the present plaintiffs. The sheriff stated that when this was done he had forgotten the circumstance of having placed the defendant in charge of the property at the Paris station in the manner mentioned. The delivery by him to the plaintiffs took place at Brantford, where the sheriff gave up the property in charge there, in the name of the whole property along the whole line of railway ; and he said that, if he had remembered the matter respecting the defendant at the time, he would have informed the parties how it was. On this delivery by the sheriff, Mr. Barlow, as the agent of the plaintiffs, put the plaintiffs' workmen in charge of all the property on the 30th of June, 1856. It was after this that the defendant took the pro-

perty, asserting that he had a claim to it by virtue of and under the warrants of execution in his hands at the time the sheriff placed him in charge of the property: namely, on the 29th of April, 1856: and the plaintiffs, to get it again into their possession, sued out a writ of replevin on the 26th of July, 1856. Mr. Barlow proved that it was arranged on the part of the plaintiffs, before the 28th of June, 1856, in what manner the mortgage to the trustees of the town of Brantford should be settled, though it was not fully completed until after that day. The money to satisfy the amount due to Her Majesty was paid on the 16th of July, 1856. Both of these mortgages were satisfied out of the purchase money, which the plaintiff's were to pay for the purchase of the road and the stock, &c., mentioned in the mortgages; and Mr. Barlow stated that at the time he so received possession of the property, on the 28th of June, 1856, the plaintiffs had never heard of and had no reason to believe that any such warrants of execution were in existence as claimed by the defendant. The plaintiff satisfied the sheriff in respect of all the executions in his hands, which amounted to nearly £40,000, and the property in his county belonging to the old railway company, the sheriff said might have been worth more than that sum, but did not suppose it could ever have realized the amount.

A verdict was taken for the plaintiffs, subject to the opinion of the court upon the foregoing facts.

M. C. Cameron for the plaintiffs.

O'Reilly, Q.C., for defendant.

ROBINSON, C. J., delivered the judgment of the court.

It appears from the facts admitted, and in evidence, that the personal property, for which this action is brought, had been mortgaged in 1845 to Her Majesty, and to Kirby and others, as trustees, long before any of the division court executions were taken out, which are mentioned in the pleas. These two mortgages were for large sums, and according to the sheriff's testimony the property assigned by them would not have produced, upon any sale of them that could have been made, sufficient to extinguish the mortgage debts. However that may be, the mortgage vested the legal property in the mortgagees, and it continued theirs until after the satisfaction

of their debt through the arrangement that had been made between the old and new railway company. The division court judgments and executions against the Buffalo and Lake Huron Railway Company would in themselves have been no lien upon the property, if it had at the time belonged to the Buffalo and Goderich Railway Company. Then what was the position of things on the 28th of June, 1856, when the sheriff withdrew from possession, and delivered over the goods to the Buffalo and Lake Huron Railway Company, up to which time the division court bailiff could not have seized them in execution, first, because they were the property of the mortgagees, and, secondly, because they were in the custody of the law, having been seized by the sheriff by process from a superior court against the Buffalo, Brantford and Goderich Railway Company? The money which discharged the mortgages, and paid off the executions from the superior court, had not yet been paid; but the sheriff relinquished the possession, and gave up the goods to the new company, on being satisfied that they had acquired by purchase the interest of the old company in them, and that the money under that arrangement would be punctually paid. Then it seems that this arrangement, all made and carried out under sanction of the act of parliament, made the new company the owners of the goods, for the same arrangement that provided for the assumption by the new company of their debts, made them the owners of the property in question.

In the case of *The Buffalo and Lake Huron Railway Company v. Gordon*, which was before us this term, there was a lien for freight upon the iron that was the subject of that suit, which had been attached while the Buffalo, Brantford and Goderich Railway Company were the undoubted owners of the property, and we held that the ship-owners had not lost their lien, by reason of the subsequent transfer of the property to the new company, which had been sanctioned by the legislature. The difference between that case and the present is, that here the executions of the plaintiffs in the division court had not attached while the goods were

the property of the defendants in those writs, and there was nothing therefore which could entitle them to seize the goods after they had been transferred to the new company.

The agreement made with Mr. Barlow, on the 11th of February, 1856, preceded by some time the issuing of those executions, and the statute in which it is recited and confirmed (19 Vic., ch. 21, sec. 18) makes the line of railway, and the personal property belonging to it, including that in question, the property of the new company, recognizing such liens as might have been created by judgments registered before the passing of that act.

It is a further difficulty, too, in the way of the defendant in this case, that before the sheriff had ceased to hold the goods which he had seized, whether properly or not, under writs of execution from the superior courts, the division court writs had ceased to be current, for the thirty days had expired; and we see no right the bailiff could, at any rate, have had at that time to seize an equity of redemption in goods, which, till the mortgages had been satisfied, was all the interest the old company held.

Judgment for plaintiffs.

BROWN V. GORDON.

Suit by Coroner on note seized under execution—Pleading—20 Vic., ch. 57, sec. 22.

The plaintiff, as coroner, sued upon a note made by defendant, payable to B. or order, alleging that while it remained unpaid, one M. recovered a judgment against B., C. and D., and issued a *fi. fa.* directed to the plaintiff, under which he seized the note.

Defendant pleaded, that after the making of the note, and before this suit, B. being the owner and holder of said note delivered it to C. to receive the amount thereof, and pay with it a demand made by the owners of a certain vessel against B. & Co., and hand over the residue to the Commercial Bank. And further, that in the suit in which said judgment was recovered, an order was made for defendants to appear and be examined before the judge of the county court as to the debts due them, &c., and the said note was then filed in the Court of Common Pleas: that the plaintiff and M. had notice of the premises, and said note was taken out of the said court by the fraud of the plaintiff, and others, in collusion with him, and the plaintiff, at the commencement of this suit, was the holder of said note by fraud.

Held, on demurrer to the plea, declaration good, for it must be assumed that the writ was properly directed to the coroner, as it might be under 20 Vic., ch. 57, sec. 22.

Plea bad, as shewing no defence.

The plaintiff, describing himself as coroner of the county of Hastings, declared that the defendant, on the 3rd of

May, 1855, his promissory note now overdue, promised to pay one Henry Bull, or order, on the 3rd of November, 1856, £390: that the said note was duly presented for payment, and was dishonoured: that afterwards, and while the said notes were due and unpaid, one J. W. D. Moodie recovered judgment in the Common Pleas at Toronto against the said Henry Bull, Maurice Cuvillier, and Francis Macanany, for a certain debt of £1,500, and £557 14s. 10d. damages and costs. That said judgment being in force and said debt and damages unpaid, the said Moodie, to obtain satisfaction thereof, sued out a *fi. fa.*, directed to the coroner of the County of Hastings, which was delivered to the plaintiff, as such coroner of said county, to be executed, by virtue of which writ, and the statute in that behalf, the plaintiff, as such, coroner, seized and levied upon the note so made by the defendant, belonging at the time of said seizure to the said defendants in said judgment, or some or one of them, of all which defendant had due notice: that said debt and damages were still unpaid, yet defendant had not paid the said note. And the plaintiff, by virtue of the statute in that behalf, claimed damages to £500.

Second Plea.—That after the making of said note, and before the commencement of this suit, to wit, on, &c., the said Bull then being the owner and holder of said note, delivered the same to said Cuvillier for certain purposes: namely, to receive the amount of said note from defendant, and apply the said moneys so received to the payment of a certain demand made by the owners of a certain steamer called *Saint Helen*, against certain persons trading under the name, style and firm of "Henry Bull & Co.," and to pay over what might be the residue of the said moneys to the Commercial Bank of Canada, at that time known as the Commercial Bank of the Midland District. That in the said cause in the declaration mentioned, in which the said Moodie recovered against the said Bull, Cuvillier and Macanany, the debt and damages in the said declaration mentioned, a certain order was made by the then judge of one of her Majesty's superior courts of common law in Upper Canada, commanding the said Bull, Cuvillier and

Macanany, to appear and be before William Smart, Esq., judge of the county court of the county of Hastings, and submit to be examined *viva voce* on oath as to the debts due and owing to them, and each of them, and to produce to the said William Smart all books of account, papers, writings, and evidences of debt relating to such debts; and that on the said day, as commanded in the said order, the said Cuvillier did appear, and did produce the said note to the said judge, and that the said note was then deposited in her Majesty's Court of Common Pleas aforesaid, and filed on record by the deputy clerk of the Crown and pleas in and for the County of Hastings. And the defendant avers that the plaintiff had notice of the premises, and the said Moodie had also notice of the premises, and that the said note was taken, seized, and obtained out of the possession of the Court of Common Pleas, and the said deputy clerk of the Crown and pleas, by the plaintiff, which is the seizure in the declaration mentioned; and that the taking, seizing, and obtaining, by the plaintiff, of the said note, out of the possession of the said deputy clerk of the Crown and pleas in and for the county of Hastings, and out of said Court of Common Pleas, was procured and caused by him, and others in collusion with him, by fraud and covin; and the plaintiff was, at the time of the commencement of this suit, the holder of the said note by fraud and covin, as aforesaid.

The plaintiff demurred, on the grounds, that the plea contains no answer to the declaration; that it admits the facts set out in the declaration, and shews no ground of defence to the action. That fraud cannot be set up in this action as between the parties thereto. That the plaintiff cannot be defeated by defendant's plea in this action, so long as it is admitted he held the said note under seizure, as stated in the declaration, and that defendant owes the money according to the tenor of the note. That the plea can only be a defence as to part, whereas it goes to the whole.

Defendant joined in demurrer, and excepted to the declaration. 1st—That it does not appear by the said

declaration, that the said Henry Bull ever endorsed the said note to the plaintiff. 2. That the plaintiff in the declaration had no right to seize the promissory note in the declaration mentioned, and by the seizure acquired no such right or property in the said note, or the proceeds thereof, as to enable him to maintain this action. 3. That a writ of *fi. fa.* directed to a coroner does not authorise him to seize a promissory note thereunder, when the sheriff of the county of which he is coroner is not a party to the suit. 4. That under any writ of *fi. fa.* or execution, a coroner has no right to seize a promissory note. 5. That it does not appear by the said declaration that there was any legal or valid ground for directing the writ to the coroner of the county of Hastings, instead of the sheriff of said county. 6. That it does not appear by the said declaration that any of the parties to the judgment mentioned therein was the sheriff.

Bell, for the demurrer.

Hector Cameron, contra, cited *Letsom v. Bickley*, 5 M. & S. 144; *Bastard v. Gutch*, 1 Har. & Wool. 321.

ROBINSON, C. J., delivered the judgment of the court.

As to the exceptions to the declaration, the defendant's counsel confined himself on the argument to those which deny the sufficiency of the declaration, on account of its not shewing how it was that the execution in the case of *Moodie v. Bull et al.* came to be directed to the coroner.

We think we must assume, in this action at least, that that execution was a valid process, and regularly issued, there being nothing that makes it certainly void upon the face of it.

As such a writ can, we know, under certain circumstances, be properly directed to a coroner, we must assume that those circumstances existed here. And, besides, the defendant has pleaded over, setting up as his defence, not that the plaintiff in this suit had not authority to act upon the writ directed to him, but that the note had been disposed of by Bull, the payee—that he had no longer a seizable interest in it; and further, that the plaintiff got the note into his possession fraudulently, and by collusion.

Our late statute 20 Vic., ch. 57, sec. 22, which subjects promissory notes to be seized under execution, gives the power to seize them to the sheriff "*or other officer having the execution of the writ,*" and further allows the amount secured by the note to be recovered in an action brought in the name of such sheriff or other officer, so that there is no difficulty in assuming that this writ may have been properly directed to the coroner; and we are bound to do so till the contrary is shewn, for the presumption is, that what was done in that respect in the Court of Common Pleas was properly done. The case cited of *Bastard v. Gutch* (1 Har. & Wool. 321), is an authority against this objection.

Then we have to look at the plea, which is demurred to.

It sets up a double defence: 1st—That the note, when seized, was not the property of the execution debtor Bull.

And, 2ndly—That the coroner got it into his possession by fraud and covin.

As to the first, it is not shewn, by what is stated in the plea, that any other party had acquired a legal title to the note. Bull had not indorsed it, so far as appears, and it is not stated in the plea that it had in any way been appropriated by Bull, either to the owner of the steamboat *Saint Helen*, or to the Commercial Bank. For all that appears, no one was in a situation to contest his ownership of the note, but he had merely given a direction to his co-defendant respecting it, which, for all that appears, he could have recalled at any time.

And as to the other defence pleaded, it is no defence to be set up by the maker of the note, if it could in any shape be set up by Bull, and if the facts as set out would shew the seizure to be a void act, which we do not say they would, for there are many cases in which person and property are seized under process, when the officer has not effected the purpose of the writ without doing what was irregular, but still the execution of his process has not been held to be thereby frustrated.

Judgment for plaintiff on demurrer.

MCLEAN V. THE TOWN COUNCIL OF THE TOWN OF BRANTFORD.

Corporation—Liability for work—Authority of Committee—Countermand—Corporate Seal—Appeal.

The Municipal Council for 1856 passed a resolution that certain work should be done, for which a verbal tender was made by the plaintiff, to the street and side-walk Committee, and accepted in writing by a majority of the Committee, after the last meeting of the Council in 1856, and without the tender having been submitted to the Council, or any written contract executed. In April, 1857, some time after the plaintiff had commenced the work, the Council passed a resolution notifying him not to proceed, but he went on notwithstanding, and completed it, and in this action brought for the price, a verdict was taken for the plaintiff, with leave reserved to enter a verdict for defendants, unless the whole amount claimed could be recovered.

Held, affirming the judgment of the court below, that the plaintiff could not recover.

Held, also, that an appeal would lie from the decision of the judge below on a verdict so taken.

APPEAL from the county court of the county of Brant.

The facts of the case are so fully stated in the judgment of the learned judge, given in the court below, that it is unnecessary to give the evidence taken there at length.

JONES, J.—The declaration in this cause was on the common counts for work, labour, and materials, goods sold, money counts, and account stated. Plea, never indebted.

The plaintiff claimed £76 15s. 7d., for the materials and work in the construction of 68½ rods of side-walk, on Colborne-street, in the town of Brantford, at \$4½ per rod.

It appeared by the evidence, that the Council for the year 1856, shortly before their time of office expired, passed a resolution that the side-walk in question should be built, not specifying, however, whether the work should be done by tender, nor directing who was to give out the contract, nor how it was to be paid for. On the 17th of December, a verbal tender was made to the street and side-walk Committee, by the plaintiff, to do the work and furnish the materials for \$4½ per rod. A written acceptance was put in at the same date, signed by a majority of the Committee, and accepting the plaintiff's tender as the lowest.

It was proved that the tender was not submitted to the Council, and that the acceptance in fact was signed by the Committee after the Council rose on the evening of the 17th

of December, which was their last meeting before going out of office. No written contract was executed between the parties, and no order under defendant's corporate seal.

The plaintiff did nothing towards making the side-walk that year, but on the 10th of April, 1857, he ordered the necessary lumber for the work, two loads of which were delivered before the 17th of April. On the 17th of April, the matter having been brought before the new Council, they passed a resolution notifying the plaintiff not to proceed with the work. The plaintiff, not regarding this event, went on and completed the side-walk. Evidence was given to shew that it had been the usual practice, when the Council ordered a work like this to be done, for the street and side-walk Committee to give out the contract without reference to the Council, and when the work was completed the Council accepted and paid for the same, although the defendants gave some evidence to shew that this practice was not uniform, but that sometimes the Council themselves gave out the work.

The defendants objected that this Committee had no power to act on such a resolution, but that the tender should have been submitted to the Council, and the work given out by them; and, secondly, that waiving the first objection, the Council were not liable, as they had notified the plaintiff not to proceed with the work, and to hold them liable would be to enforce the performance of an executory contract against them when they were not bound by their corporate seal. It was consented at the trial that a verdict should be entered for the plaintiff for £76 15s. 7d., the amount claimed, subject to be moved against by the defendants, the plaintiff agreeing that in case his verdict could not stand for the whole amount the court should have power to set it aside, and enter a verdict for the defendants. The defendants have therefore moved a rule to set aside this verdict, and enter a verdict for them.

I am of opinion that this rule must be made absolute. As regards the first objection—that the Committee had no power to give out the contract, but that the tender should have been submitted to the Council, and the work given out

by them—I think it very questionable if this Committee did not exceed their power in acting as they did, independent of the question whether they should not have laid the tender before the Council, and awaited their directions. I think the circumstances under which they accepted the tender are such as to throw great suspicion on the transaction, if not to avoid it altogether. This acceptance, it was shewn, was signed by the Committee on the eve of the Council going out of office, for a work which would devolve on their successors to carry out, and was in fact signed after the last meeting of the Council for that year, when in fact the body from whom the Committee derived their power had ceased to act. It would, I think, be going a great length to say that the future Council would be compelled to carry out such a transaction.

But it is upon the second objection that I think the plaintiff's case clearly fails: that is, that the defendants are not bound, their being no contract under their corporate seal. There are a great many cases to shew that where work is done for a corporation within the legitimate scope of their powers, which work they have accepted and adopted, they cannot, when sued for the price, object that no order was given under their corporate seal. See *Beverley v. The Lincoln Gas Company* (6 A. & E. 829), *Fishmongers' Company v. Robertson* (6 Scott's N. R. 56). In the latter case the law on this point is very fully considered.

This principle of law has been considered well settled, and seems to be founded on justice, that when a corporation accepts and adopts a work, receiving thereby all the benefit from it, they should be estopped from alleging that they did not order it to be done in such a manner as to make them legally liable. There are, however, some late cases where the courts have held that even in executed contracts, under certain circumstances, corporations are not liable, except when bound by their corporate seal. See *Regina v. Mayor of Stamford* (6 Q. B. 423), *Cope v. Thames Haven Dock and Railway Company* (18 L. J. 345 Exch.), *Lamprell v. Bellericay Union* (3 Ex. 283), *Diggle v. London and Blackwall Railway Company* (5 Ex. 442), *Homersham v.*

Wolverhampton Water Works (6 Ex. 134), Williams v Chester and Holyhead Railway Company, (15 Jur, 828). I do not think, however, that these cases overrule the principle of law above laid down, but are rather exceptions to the general rule.

It then remains to be considered: does the present case fall within these that are considered as executed contracts? I think clearly not. The plaintiff, at the very inception of the work, is notified by the defendants not to proceed with it. Upon what principle, then, can the defendants be bound to pay for work which the plaintiff goes on and does despite their order? To hold them liable in such a case would be to declare that a legal binding contract existed, a contract on which the plaintiff would be entitled to recover damages if prevented from performing it by the defendants.

The case of *Bartlett v. The Municipality of Amherstburg* (14 U. C. R. 152), seems to me to be quite in point. There the plaintiff, after having, by the order of the Council, undertaken to build a side-walk, and having done work on it to the amount of £26 15s., was ordered by the new council to desist from the work. He did so, and brought his action to recover for the amount he had done, and also damages for not being allowed to complete the job. The court held that although entitled to recover the former, he could not claim damages for not being allowed to complete it, as the contract was not under defendants' corporate seal, and that the plaintiff acted correctly in desisting from the work on being so notified. In the present case, no evidence was given to shew the value of any of the work the plaintiff performed before being notified not to proceed, and the plaintiff's counsel at the trial abandoned any such claim, and consented that if the court should be of opinion that the verdict could not stand for the whole amount, that then a verdict should be entered against him. The rule will therefore be made absolute to set aside the verdict, and enter a verdict for the defendants.

From this judgment the plaintiff appealed.

Burns, for the appeal.

M. C. Cameron, contra, objected that no appeal would

lie, for the verdict was taken subject to the opinion of the judge, and the statute 8 Vic., ch. 13, sec. 57, allows an appeal only in case either party shall be dissatisfied with the decision of the judge "upon any point of law arising upon the pleadings, or with the charge to the jury, or the decision upon any motion for a nonsuit, or for a new trial, or in arrest of judgment." The court, however, over-ruled this objection, and the case was then argued upon the merits.

The authorities cited are referred to in the judgments.

ROBINSON, C. J., delivered the judgment of the court.

The learned judge of the County Court of Brant, who tried this cause, has stated the points in issue and the ground of his judgment very carefully. The view which he took of the case is quite in accordance with the case of *Bartlett v. The Municipality of Amherstburg*, decided in this court (14 U. C. R. 152), and is not at all at variance with any thing determined in the other case of *Fetterly v. The Municipality of Russell and Cambridge*, referred to and reported in the same volume, 433.

The plaintiff in this case is seeking to recover from the corporation upon an implied assumpsit the value of work done not merely without their request, either formal or otherwise, but directly contrary to their order. That the people passing through the streets will walk upon the plank which the plaintiff chose to place there contrary to the wish of the corporation, rather than walk in the road, is very natural, but there was nothing in the evidence which it would have been reasonable to put to the jury as an adoption of the work by the corporation.

The corporation having told him after the work was done that they would not pay for it, would not of itself signify any thing, if they had either set him to do it, or has allowed him to apply his labour and material without forbidding or remonstrating; but the evidence shews this to be a case of a very different kind. The plaintiff seems to have been bent upon depriving the corporation of the privilege of conducting their own affairs.

Appeal dismissed, with costs.

CLARK V. WADDELL.

Statute of Frauds—Promise to pay the debt of another—Contract in writing.

Plaintiff had worked for M. & D. at their mill, and they owing him for wages, the plaintiff's father proposed to let them have a siding machine to put up in the mill, and that the plaintiff should work it until he had saved enough to pay his arrears, his wages while so engaged, and the price of the machine. Defendant, who was then about to purchase the mill from M. & D., agreed to this proposition, and he afterwards completed the purchase. The machine was put up and worked by the plaintiff, and defendant afterwards promised to pay him his wages while so employed.

Held, that by the arrangement defendant had assumed the arrears due to defendant by M. & D. as a debt of his own, and was liable without any written agreement; but

Held also, that his letters, set out below, sufficiently shewed a contract in writing.

Action on common counts. Pleas—1. Never indebted.
2. Payment. 3. Set-off.

At the trial, at Sarnia, before *McLean, J.*, it appeared that the plaintiff had worked for Murray & Davis, at a saw-mill owned by them on the north shore of lake Huron, and when he left them they owed him £109, and being unable to pay him, the plaintiff's father proposed to Murry & Davis that he should let them have a siding machine to put up in the saw-mill, and that the plaintiff should set it up and continue to work it until sufficient lumber should be sawed with it to pay the plaintiff's arrear of wages, and his wages while employed in attending the siding machine, and to pay for the machine itself.

The defendant being then about to purchase the mill from Murray & Davis, was informed of this proposal, and said he would agree to it, and take the plaintiff into his service upon that understanding.

Murray, after the defendant became the owner of the mill continued to work in the mill as foreman, and it was proved that the defendant told the plaintiff's father, who was examined as a witness upon the trial, that Murray had an interest in the mill, and that he and Murray would settle this matter between them.

The witness swore that it was in consideration of the defendant's assuming and promising to pay the amount due to the plaintiff that the witness agreed to let the siding machine go into the mill.

The father swore that in July, 1856, the defendant told him that he would pay the plaintiff £62 10s., the amount of his wages while in the defendant's employ working with the siding machine, if the bank at Sarnia would discount a note, and that he would pay the amount assumed by him for Murray & Davis, and the amount due to the witness for the siding machine, in three months.

Some letters were put in, one from the defendant to the witness, plaintiff's father, dated 18th January, 1855, in which he wrote thus: "I submitted your proposition regarding your son going up to my mills on the north shore of lake Huron to Mr. Murray, and he seemed to be of opinion that it would work well. The way you spoke, if I understand you correctly, was as follows: Your son was to go up with my vessel in the spring, taking with him one of the siding machines you gave me the advertisement of. He was to set up his machine, I finding him power and timber; he was to cut siding enough to pay up his arrears due by Murray & Davis to himself, and his brother, his own wages while he was at work with the machine, and the price of the machine, which when paid for was to be left there. I will guarantee to perform my share of this undertaking, and all I want to know from you now is what I may reckon on in regard to the matter."

On the 18th of August, 1856, defendant wrote to the witness thus: "I dare say you think me about as bad as Murray & Davis, and if you do, I don't blame you." He enumerated many disappointments he had met with in getting money from persons who owed him, and stated that out of all the lumber he had shipped in the spring there had been only one-third paid for. He mentioned some hope he had of getting an advance on a load of lumber at Chicago, and "that if that failed he would sell the 'St. George' for what she would bring." In the mean time he said it was necessary to have patience.

There was no dispute at the trial about the amount of the wages due to the plaintiff from the defendant for the time he was working with the siding machine, or the plaintiff's right to recover it; but the defendant objected that the evidence

did not entitle the plaintiff to recover for the other portion of his demand, namely, the amount of wages due to him by Murray & Davis, which the defendant agreed should be paid out of the lumber sawed by the siding machine, when enough had been sawed to pay it, and the other wages, and for the price of the machine. This amount was agreed to be £41 9s. 1½d.

The verdict was taken for the whole amount claimed, reserving leave to the defendant to move to strike this sum out, if the court should think the action as to that part was not supported.

Duck obtained a rule *nisi* accordingly, citing *Kirkham v. Marter*, 2 B. & Al. 613; Ch. Con. 4th Ed. 441; *Gull v. Lindsay*, 18 L. J. (Ex.) 354; *Tomlinson v. Gell*, 6 A. & E. 564; 1 Wms. Saund. 211.

M. C. Cameron shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

No objection was taken for want of declaring specially. The case has been fairly argued on the substantial point, whether the defendant is legally liable for that portion of the demand which is disputed. We think he clearly is liable, for independently of the defendant's letters, as evidence of a contract in writing under the Statute of Frauds, this was not a naked undertaking by the defendant to pay the debt of Murray & Davis. He assumed that debt as part of an arrangement entered into for his own benefit, by which he acquired the siding machine spoken of, and acquired also the services of the plaintiff for a special purpose, which, for all that appears, he could not have had upon other terms. The effect of his undertaking was to make the debt his own, he binding himself that out of the proceeds of lumber sawed by the siding machine, he would pay first the arrear of wages due to the plaintiff by Murray & Davis; next, the amount of his wages while he worked for the defendant; and lastly, the price of the siding machine. As he received money then for the lumber to be sawed by the plaintiff for him, and which he, as the owner of it, was to sell, it would be money held by him for the

parties entitled to it under his agreement, and would be recoverable under the count for money had and received. The case of McDonell v. Cook, in this court (1 U. C. R. 542), is much in point.

The jury, we dare say, had no doubt that the defendant must have received sufficient to pay the charge now in question, which was to be the first paid, and we should infer that from his letters and from the time that had elapsed. Indeed, his having paid the plaintiff for the labour rendered to himself would seem to amount to an admission that he had been in funds to meet the other, for he had only engaged to pay these latter wages out of the same fund, and after paying that other demand which is now in question; and besides this, there is the written evidence which the letter of the 18th of August, 1856, affords, which expresses both the consideration and the promise.

Rule discharged.

During this term the following gentlemen were called to the bar, EDWARD TAYLOR DARTNELL, ERNESTUS CROMBIE, CALEB ELIAS ENGLISH, and THOMAS HODGINS.

EASTER TERM, 21 VICTORIA, 1858.

Present :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD MCLEAN, J.

“ ROBERT EASTON BURNS, J, (a)

CRONYN V. WIDDER ET AL.

Lotteries—12 Geo. II. ch. 28—19 Vic., ch. 49.

Plaintiff sold a tract of land to H., giving an agreement to convey on payment of the purchase money at certain periods, and H. re-sold it in lots by a lottery, which the plaintiff was aware of, but had nothing to do with. After the drawing it was arranged that the plaintiff, instead of H., should enter into agreements with the persons purchasing by the tirage to convey to them the lots which they had drawn on the terms there agreed upon, and that the sums payable by them should be received by the plaintiff on the covenant to pay contained in one of such agreements—

Held, that the sale by lottery was illegal, under the 12 Geo II., ch. 28, which must be treated as in force here at the time of such sale, notwithstanding our act, 19 Vic., ch. 49; and that the agreement declared upon, being an adoption of such sale, could not be enforced.

The plaintiff declared on a covenant by defendants, to pay to the plaintiff the sum of £268 12s. 11d., with interest at the rate of 6 per cent. per annum, on the days and times following: that is to say, £50 down, and the balance in five equal instalments, payable annually, on the 22nd day of February in each year thereafter, with interest on the unpaid principal, the first of such instalments to be paid on the 22nd day of February, 1855, alleging that three of the said instalments, for the years ending 1855, 1856 and 1857, and interest, became due and payable by the defendants to the plaintiff, but the defendants, or either of them, had not paid the same, or any part thereof.

Defendants pleaded that the deed and covenant in the declaration mentioned were made and executed by the defendants to secure a portion of the purchase or consideration money for certain lands unlawfully sold to and purchased

(a) Mr. Justice Burns was prevented by a domestic affliction from attending Court during the last four days of this term.

by the said defendants by way of lottery, by a method or device depending upon and to be determined by lot or drawing, contrary to the form of the statute in such case made and provided, as the plaintiff at the time of making the said deed and covenant well knew, and the moneys in the said deed and covenant and in the declaration mentioned were part of the said purchase money.

The plaintiff took issue upon this plea of the defendants.

At the trial, before *McLean, J.*, at London, the agreement, containing the covenant on which the action was brought, was put in by plaintiff, bearing date 4th of January, 1854, and a statement of amount claimed was made up at £176 6s. 11d.

The defendants then called Charles Hutchinson, who stated that an instrument produced by him was a copy of an agreement entered into by him and Charles Hammond for the sale of certain property by *tirage*, which they had purchased from the plaintiff. The plaintiff had nothing to do with that sale. He had sold to the witness and Hammond, and had entered into articles of agreement with them, by which the payment was to be made at certain periods. After witness and Hammond had purchased, they found they had difficulty to meet payments, and they decided upon offering the whole at £5 per foot, and for the purchasers to divide the land amongst themselves by lot. That was done according to the agreement dated the 4th of January, 1854 (a), and on the 22nd of February the parties who had subscribed divided the ground amongst themselves by drawing lots. One of the lots had a house on it, much more valuable than other lots. The person who drew that paid up the purchase money at £5 per foot, which amounted to upwards of £500. for the lot had a large frontage, and amounted in consequence to a large sum: the lots varied in value and in extent: all the subscribers paid or agreed to pay the same sum, and were to take their chance by lot in the division. No specific parcels of land were sold, but each subscriber undertook to pay a certain sum, and to take what might come to him on

(a) The terms of this agreement are stated in judgment of *McLean, J.*

drawing lots. The division of lots was managed by two persons chosen by the subscribers, who were present at the time. Defendants were not present, but were aware of the time appointed for drawing. The witness stated that he had no doubt that the plaintiff was aware of the mode adopted by Hutchinson and Hammond for disposing of the property. It was much talked of at the time, and he must have been aware of it, but he knew nothing of the details, that the witness was aware of. The scheme originated with the witness: he procured subscribers. The purchasers agreed to pay according to the terms, on receiving agreements from the witness and Hammond to convey the premises, according to the division by lot; but the witness and Hammond could not give such articles of agreement as would be satisfactory to the parties, and witness then asked the plaintiff if he would consent to enter into agreements with the several parties who had subscribed. The amount of subscriptions was much larger than what the plaintiff was to receive from the witness and Hammond, and the witness proposed to him to enter into agreements to the extent of his purchase money. The first payment to be made down, and which was paid down, did not go to the plaintiff, but was retained by witness and Hammond. The plaintiff was aware, when he took the agreement from the several parties, of the manner in which they had acquired their several lots. He received agreements from these parties for the exact amount which the witness and Hammond had agreed to pay for the land. The defendants drew certain portions of the whole tract, and executed the agreement produced for the payment of the purchase money, and received from the plaintiff an agreement to the same effect, and to convey the land. When the witness sent to the defendants the agreement to be executed, he explained how it was that the agreement was from the plaintiff, instead of from witness and Hammond.

Another witness stated that he was a party to the tirage, a successful one: that he subscribed, and got a ticket or chance in the lottery, and paid for it, and after the drawing was agreeably surprised to find that he had gained the best prize in the lottery. The price of each ticket or chance he

thought was £100, but he could not say absolutely. He and another bought tickets, and agreed to share alike in the proceeds. The house and lot which he drew was to be paid for—valued at £500—at the rate of £5 per foot, as witness supposed. It was worth a great deal more than that amount. He was not present at the drawing, and had nothing to do with it. He was quite aware it was to be a lottery, depending upon the drawing.

The defendant's counsel having objected to the right of the plaintiff to recover upon the evidence, the learned judge gave it as his opinion then that the plaintiff could recover the amount due, but reserved leave to the defendants to move to enter a nonsuit, if the court should think otherwise, and a verdict was taken for the plaintiff for £176 6s. 11d. damages.

Christopher Robinson obtained a rule *nisi* accordingly. He contended that the 12 Geo. II., ch. 28, must be held to be in force here, notwithstanding the 19th Vic., ch. 49—*Clark v. Donnelly*, Rob. & Har. Dig. 223; *Wallbridge v. Beckett*, 13 U. C. R. 395; *Goodeve v. Manners*, 5 Chan. Rep. 125. That the evidence clearly shewed that defendants had purchased by lottery, for this was not a case where parties having acquired a tract of land divide the joint purchase by lot, so as to make it a partition within sec. 11. That the sale by *Hammond and Hutchinson* being therefore illegal, the plaintiff could not recover, for he had simply adopted that sale, knowing how it had been made, and entered into the agreement sued upon to convey to defendants the land which they had purchased by lottery on the terms then arranged.—*Fisher v. Bridges*, 2 E. & B. 118, 3 E. & B. 642; *Broom Com.* 364; *Broom Leg. Max.* 581; *Wright v. Wheeler*, 1 Camp. 165; *Follett et al v. Moore*, 4 Ex. 410; *Hay v. Ayling*, 16 Q. B. 423.

Freeland shewed cause, and argued that the 12 Geo. II., did not apply to this case, or render the sale illegal as made by lottery: that though the plaintiff was aware of the mode of sale adopted by Messrs. *Hammond and Hutchinson*, to whom he had sold the whole for a specific price, yet that he was not a party to such sale, and only carried out the sale

to defendants as a part of his original sale, and received their obligation to pay a certain portion of the purchase money payable to him.—*Barnes v. Hedley*, 2 Taunt. 184. That the legislature must have considered the 12 Geo. II., ch. 28, not in force in Canada, as they had since this sale passed an act, 19 Vic., ch. 49, to declare all lotteries and sales by lottery illegal.

ROBINSON, C. J.—The first question is, whether the statute 12 Geo. II., ch. 28, is in force in Upper Canada.

Any one reading our later statute, 19 Vic., ch. 49, would infer from it, I think, that the legislature passed it under the impression that the disposing of real or personal property by lottery in Canada was not an offence before that act was passed, yet the 12th Geo. II., ch. 28, had been assumed to be in force in Upper Canada, not from its intrinsic obligation, but by reason of our adoption by statute 40 Geo. III., ch. 1, of the criminal law of England as it stood in 1792, of which this statute was considered to form a part.

The statute 13 Geo. II., ch. 19 against horse-racing, has in like manner been held to be in force in Upper Canada, and has in several cases been acted upon, and I think it is clear that the statute against horse-racing cannot be held to be in force upon any principle which would not equally apply to the statute against lotteries.

The cases in which the prohibition against lotteries, and disposing of goods by any device of chance has come under consideration, are *Clarke v. Donnelly* (Rob. & Har. Dig. p. 223), of which there appears to be no printed report, *Wallbridge v. Beckett* (13 U. C. R. 395), and *Jameson v. Sherwood* (14 U. C. R. 282). In *Goodeve v. Manners* (5 U. C. Chan. Rep. 182), the statute 12 Geo. II., ch. 28, against lotteries, was under consideration, and was rather assumed than declared to be in force.

I do not find that any case has been decided in our Common Pleas in which the statute of 12 Geo. II., against lotteries, has come under consideration, but in *Fulton v. James* in that court (5 C. P. 182) the statute of 12 Geo. II. against horse-racing was assumed to be in force, and in this court it has

been acted upon in several cases, *Sheldon v. Law* (3 O. S. 85), and in other cases.

There are several cases in which summary convictions have been upheld in Upper Canada upon English statutes, which are not otherwise in force than as they were conceived to have been introduced under our general adoption of the criminal law, although the act done was not otherwise made an offence in England than by its being positively prohibited by statute, and a penalty enforced upon conviction before the magistrates, with imprisonment in case of the penalty not being paid.

I by no means mean to say that all such acts have been held to form part of our criminal law, for there are cases in which reason has pointed out obvious grounds for exception, as in the instance of particular regulations made for the method of carrying on certain manufactures. But when acts have been prohibited under a penalty from their tendency to lead to vice and immorality, as in the instance of Sabbath breaking and gambling, the English statutes respecting them which were in force in 1792 have been treated as being in force here. And our statute II Geo. IV., ch. 1, was passed to obviate the practical inconvenience that we were under in enforcing such acts, by reason of the penalty or a portion of it being in many cases appropriated to the poor of the parish, or in some other manner not exactly applicable to the existing state of things here.

It is material also to consider that by an English statute, 10 & 11 Wm. III., ch. 17, *all* lotteries are declared to be public nuisances; but that statute should perhaps not be held to apply to lotteries of the descriptions of those specified in 12 Geo. II., though the words are very comprehensive.

On the whole, keeping for the present out of view our statute 19 Vic., ch. 49, I think we are bound to hold the 12 Geo. II., ch. 28, to be in force in Upper Canada, first, because it comes within our adoption of the criminal law of England, and next, because this statute, and other statutes of the same nature, and resting on the same footing, have been treated in our courts as being in force.

Then, can the passing by our legislature of the act 19
46 & 47

Vic. ch. 49, have the effect of authorising us to hold that what had before been held respecting the lottery act was not law, and that such a lottery as the one now in question never was a kind of gaming prohibited by our law? I think not, though I must say I wish it could, for I fear this mode of disposing of property by lottery has in this particular instance and in others been carried to a considerable extent, and by persons who were ignorant in fact that they were violating an act of parliament.

The late statute, which was passed after the lottery referred to in this case had been held, will leave no such excuse in future, and I could desire that it were found competent to us to date the prohibition from the time it came into force. But I do not think we can. Any such act of considerate indulgence must be left to the legislature.

It remains still to be considered whether the plaintiff's right to recover is under the facts proved affected by the statute.

If the plaintiff knew what description of contract it was that was carried into effect by the covenant on which he was suing, then the case appears to come very clearly within the principle of law, which is of general application, and which was applied in the late case, cited in the argument, of *Fisher v. Bridges* (3 E. & B. 642), which was decided in the Exchequer Chamber upon the same statute, 12 Geo. II., ch. 28.

The defendants could not have sued the plaintiff upon his agreement to convey the land, which had been disposed of in a manner prohibited by the statute, and these defendants can as little be made liable to pay the consideration money to the plaintiff on condition of his conveying the land to the person who drew it in a lottery which the defendant had set up.

The statute could, in any case, be disregarded with safety, if it were only necessary to take the title from a third party, and if such third party, knowing all the circumstances, could, without incurring any risk of loss, assist in carrying out the transaction. I have no doubt that the plaintiff was in no manner concerned or interested in the lottery, and very probably did not know that such a method of disposing of

property was forbidden by our law, but he knew how the land was to be sold, and that in his name it was to be carried out; and though it is not a matter of surprise that he did not know of a prohibition, which the legislature seems not to have been aware of when they passed the statute 19 Vic., ch. 49, yet that consideration cannot prevent the application of the statute.

I think the rule for nonsuit should be made absolute.

McLEAN, J.—This case was tried before me at the last autumn assizes, in the county of Middlesex, when it appeared in evidence that the plaintiff had sold a piece of land in one block to two persons, Hutchinson and Hammond, who had it divided into thirty-five lots, with a view of selling again: that these parties got up a scheme to sell their lots by tirage, at a uniform price of £5 per foot to the parties who might subscribe, except lot No. 1, which was to be sold at £10 per foot, the lots to be awarded by tirage among the subscribers, the party to whom lot 8 should be awarded to have the option of taking that lot at £10 per foot, or of relinquishing his right thereto for the price or sum of £550, payable in cash: every subscriber to pay £50 within one month from the date of the instrument to be subscribed, and the balance of the purchase money for the lot awarded to him (according to size) with interest, in five equal instalments, payable annually: the drawer of lot No. 1, to have £40 returned to him immediately after the tirage, and to receive a clear deed for that lot forthwith. Agreements in duplicate to be entered into with the other subscribers immediately after the tirage for the conveyance to them of the said lots upon the payment of the purchase money in the manner specified: a clear deed to be given to any party paying the sum due upon the lot awarded to him: possession to be given of the several lots to the subscribers immediately after the tirage and execution of that agreement, excepting the lots formed from the house lot, as laid down on Mr. Cronyn's plan, possession of which to be given on the 1st January, 1855, and in the meantime no interest to be charged on the balance of the purchase money. This prospectus or

scheme bears date on the 4th January, 1854, and the tirage was to take place within two months from that date. On the part of the subscribers an undertaking is written on this instrument, by which they severally promise and agree, to and with Hammond and Hutchinson, that they will respectively purchase from them the lot that may be awarded by tirage, and in all things abide by the terms of the proposed sale, and as soon as may be after the said tirage enter into agreements in duplicate, binding themselves respectively, and their respective heirs, executors, administrators and assigns, well and truly to pay the said purchase money to the said Hammond and Hutchinson, in manner and at the times therein set forth.

The plaintiff was not a party to the disposal of lots by tirage by Messrs. Hammond and Hutchinson, but was aware of it before and after it was carried out. The tirage or drawing took place, according to Mr. Hutchinson's testimony, on the 22nd of February, 1854, and the defendants then became aware of the particular parcel of land which had fallen to them by lot. The plaintiff, by an instrument of that date, adopted the sale as made by Hammond and Hutchinson, of the particular piece of land which the defendants had drawn, and agreed to convey to them that parcel of land, on payment of the purchase money at the particular times agreed upon with Messrs. Hammond and Hutchinson: that is, £50 to be paid down, and the balance in five equal annual instalments and interest, to be paid on the 22nd day of February in each year, with interest on the unpaid principal.

By the terms of this agreement, the whole amount of purchase money appears to be payable to the plaintiff with interest; but by the testimony of Mr. Hutchinson it appears that the £50 to be paid down was not, in fact, to go into the plaintiff's hands, but was retained by Messrs. Hammond and Hutchinson as the first instalment payable to them, so that the plaintiff, by his agreement, is carrying out in every particular the sale made by Hammond and Hutchinson, of the parcel of land drawn by the defendants at the lottery on the 22nd of February, 1854. There is no doubt that the tirage was for the benefit of Messrs. Hammond and

Hutchinson, and was managed by them, but the plaintiff, by adopting the sale, and making his agreement to the defendants in conformity with it, has made himself a party to it, and cannot enforce a sale so made.

The 4th section of 12 Geo. II., ch. 28, expressly declares that any sale of houses, lands, &c., by any game, lottery, or other device to be determined by chance or lot, shall be void. This sale was clearly one of that description, though not made by the plaintiff, and he has had nothing to do with it except the signing of the agreement to carry it into effect. He has, however, thereby placed himself in the position of an agent or instrument to assist in completing a sale by lottery, which the statute expressly declares to be illegal and void. If the plaintiff could recover, then the illegal sale would be carried out, and the statute evaded, and the assistance of the court would be afforded in furtherance, instead of for the suppression, of these objects.

It does not to me appear to admit of any doubt that the act 12 Geo. II., ch. 28, was introduced as a part of the criminal law of England by our provincial statute 40 Geo. III., ch. 1, and the cases cited from 13 U. C. R. 395, and 5 U. C. Chancery Reports, 125, shew that the provisions of that statute are considered in force, though they may have been frequently disregarded or evaded.

The passing of the act 19 Vic., ch. 49, has placed on our own statute book a law making void all sales by lottery, but the law, as it previously stood, had precisely the same effect in that respect. I think, therefore, that the sale being void, the agreement entered into for carrying its terms into effect cannot be enforced, and a nonsuit must be entered.

BURNS, J.—I feel compelled to say, notwithstanding the act of the legislature of this province, 19 Vic., ch. 49, for the suppression of lotteries, that the statutes 10 & 11 Wm. III., ch. 17, and 12 Geo. II., ch. 28, were in force in Upper Canada previously. I am not aware of any express decision to that effect in any of our courts, but I am aware, both while at the bar and since, that it has been always assumed that these acts were in force here, and the courts have re-

peatedly acted upon that assumption. I can very well understand, however, that the legislature in 1856 should have deemed it right to pass the statute mentioned, for at that time, and for a few years before, it was quite notorious and public that a vast amount of trade was going on in the way of purchasing and disposing of lands in all parts of the country of a mere speculative character, without much capital invested. Considerable tracts of land were bargained for, and villages and towns were laid out upon paper and exhibited every where, and if the parties did not readily meet with purchasers for lots at fixed prices, then the lottery system was resorted to. The legislature probably deemed it prudent at once to put a check upon such unwise speculation, by enacting the statute, rather than wait for the slower process of the law being declared by the courts in cases of parties resorting to the enforcement of the contract, whereby the public at large would make the discovery. The fact of so many persons through the province being engaged in transactions of the kind, may have imbued people's minds with the idea that there was no illegality in so disposing of property. The legislature, in 1849, passed an act to authorise certain persons to raise the stock to build the Toronto, Simcoe and Lake Huron Union Railroad, which act was reserved for the Royal assent, thus evincing that at that time it was considered necessary to have a special act to enable a lottery to be formed. This shews that the legislature acted upon the same assumption with respect to the old English acts, that the courts have done. I see no foundation, therefore, for the conclusion, that because the legislature, in 1856, prohibited lotteries, they must be supposed not to have been illegal previously.

The next question is, whether the pleadings and evidence bring this case within the prohibition, so as to prevent the plaintiff from recovering upon the security given for the purchase money. The case of *Fisher v. Bridges* (3 E. & B. 642), decides that an agreement for the purchase money, which springs from and is a creature of the illegal contract of sale, cannot be enforced. In the present case, the contract by the plaintiff with Messrs. Hammond and Hutchinson was

free from any illegality, but their sale to the defendants was illegal, and the contract which the defendants entered into was to perfect that sale, not the sale which the plaintiff made. The security which the plaintiff took, no doubt, was in satisfaction of so much, as far as it would go, of the original purchase money, but then it is to be considered whether the plaintiff, by taking the security in his name from the defendants, does not stand in the position of an agent as it were for Hammond and Hutchinson. The defendants' plea, upon which the plaintiff has taken issue, does not charge the plaintiff with illegally selling the land, but it is said the land was unlawfully sold to and purchased by the defendants. Now, the agreement produced, and which is the one sued upon, recites that the plaintiff agreed to sell the lands to the defendants. If he did so upon the lottery disposition, there could then have been no question on the point, but the plea is wide enough to embrace the fact of any one having illegally sold to the defendants. The sale was effected by Hammond and Hutchinson, and the plea asserts that when the deed and covenant for payment was taken, the plaintiff knew of the illegality. We held in the case of Wallbridge v. Beckett (13 U. C. R. 395), that an innocent holder of a promissory note given for the purchase money of land disposed of by lottery, was entitled to recover, but I do not see how this plaintiff can be said to come within that view. He is not an innocent holder of the covenant sued upon, for though his contract with Hammond and Hutchinson is not tainted with illegality, yet the contract sued upon is not a creature of or springing from that contract; it grows out of the sale made by Hammond and Hutchinson, and if it had been direct with them must, according to the case of Fisher v. Bridges, have been held not to be enforceable. The case, then, is just simply this, can the securities taken to complete an illegal sale, be held enforceably by a person who has placed himself in the position of dealing with parties who have illegally sold, he knowing of the illegal sale before taking the security in part payment of the contract which was not illegal. We do not know what consideration Hammond and Hutchinson were to pay the plaintiff for the

whole tract of land, but we find that the consideration to be paid by the defendants for the portion mentioned in the agreement must have been a small portion of the whole, and it does not appear either whether this plaintiff may not be in a position to enforce his contract with Hammond and Hutchinson, whatever may be the result of this action. I do not think that a matter of any consequence, however. The question we have to deal with is, whether the agreement sued upon was founded upon an illegal consideration, and whether the plaintiff knew it. That has been established, and it appears to me, forms a legal defence to the action. The plaintiff simply stands, as respects this action, in the shoes of Hammond and Hutchinson: that is, he took a security in his own name for their illegal sale, instead of their doing it for themselves. It cannot be said that the plaintiff gave any consideration to these defendants for the contract entered into with them, for he had no contract with them, save the one declared on, and therefore there is no foundation for the application of the principle stated in the case in this court of *Wallbridge v. Beckett*, that an innocent holder, or one who has given a valuable consideration for the security, may be permitted to enforce it. The case of the *Gas Light and Coke Company v. Turner* (5 Bing. N. C. 666), is very applicable to the present.

I think the rule must be made absolute to enter a nonsuit.

Rule absolute.

SMITH V. HOBSON.

Sale of goods—Notes to be given—Effect of delivery.

Defendant purchased some horses and a waggon from the plaintiff, at auction, the terms being that he should give his own notes at three, six and nine months, endorsed by one W., and on his promise to give these, he was allowed to take the goods. W. refused to endorse, and the plaintiff having waited for some time without getting the notes, replevied. It was left to the jury to say whether the delivery was absolute, with intent to pass the property, or conditional on defendant's giving the notes, and they found for the plaintiff.

Held, a proper direction, and that the verdict was warranted.

REPLEVIN for the detention of horses, waggon and harness.

Pleas.—1st. *Non detinet*. 2nd. That the plaintiff was not the owner of the property.

At the trial, at Stratford, before *Hagarty, J.*, it appeared that the plaintiff sold the property by auction, and it was knocked down to the defendant, the terms of sale being that the respective purchasers, before taking the property, should furnish approved joint notes of themselves and a surety, payable in six months, with interest.

The defendant having bid off the property, came the next day, when it was agreed that, instead of a joint note with a surety, at six months, the defendant might give his own notes for the amount, endorsed by one Woods, and payable at three, six, and nine months, and the defendant was allowed to take away the goods upon his promising to give such notes.

He did not furnish the notes, and after waiting a month upon him, the plaintiff's agent demanded the property back, Woods having refused in the meantime to endorse the notes. The plaintiff made certain propositions to the defendant, who declined acceding to them, saying he would rather give up the property; and at last, not being able to get any thing satisfactory done, the plaintiff replevied the horses, and the defendant afterwards gave up the waggon.

It was objected on the trial that the plaintiff's only remedy was to sue for the money, or for breach of the promise to furnish the endorsed notes.

The learned judge left it to the jury to find from the evidence whether the horses were delivered to the defendant with intention then to pass the property, and looking to his personal responsibility for paying the money or furnishing the endorsed notes, or whether the defendant was merely allowed to take possession of them on the condition that he should furnish the notes, the plaintiff reserving to himself the right to reclaim them if the money was not paid or the notes furnished.

The jury took the delivery to have been merely conditional, and found for the plaintiff.

J. Duggan obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection.

C. Robinson shewed cause, and cited *Sm. Merc. L.* 464-5; *Bishop v. Shillito*, 2 B. & Al. 329; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Higgins v. Burton*, 26 L. J. Ex. 342.

ROBINSON, C. J.—The vendor might or might not in such a case be left to the necessity of bringing an action for breach of the vendee's promise to deliver such notes as he had agreed to deliver, or to sue for the price of the goods, where there had been no agreement to deliver notes.

All must depend on the understanding between the parties. In general he would be left to his action for the price, either upon the special agreement for payment in a particular manner, when there was one, or otherwise upon an implied assumpsit for the value. But when the goods are suffered to be taken possession of by the vendee, not as of right, and with the intent that the property shall vest in him, but conditionally, upon the understanding that he is to pay or secure the price in a certain manner, or else to return them, then a breach of the condition re-vests the property in the vendor, and gives him a right to claim its restitution. It was left to the jury to say from the evidence whether this was or was not a case of that kind. They found it was such a case, and the evidence seems to have warranted the finding. It was consistent with the original terms of the sale, and there was no reason to conclude that when the vendor consented to terms of payment which rather extended the credit, he intended to waive the giving of security as a condition on which the right of possession was to depend, though he might for a time part with the possession on the defendant's assurance that he would furnish the notes. The case went to the jury with a proper direction, and they found expressly that the delivery of possession was but conditional.

The circumstance of the defendant voluntarily returning the waggon when he found he could not procure such a note as he had promised, and after the horses were replevied, goes strongly to shew that he was conscious he was bound to return the property.

MCLEAN, J.—The jury have found for the plaintiff, and the verdict is certainly not inconsistent with the justice of the case. The defendant bought the horses, waggon and harness, at auction, subject to certain conditions as to security and payment: not being able to fulfill these, for his accommo-

dation a longer term of payment and a certain individual security were agreed upon in lieu of the former terms, and the defendant was allowed to take away the horses and waggon. When urged subsequently to fulfil the terms on which he had received them, he refused to do so, and said he would rather give them up than do as he had promised. When the plaintiff replevied the horses, the defendant gave up the waggon, and thereby, as it appears to me, admitted the plaintiff's right to take the whole. The question was fairly left to the jury, whether the plaintiff had parted with the property, relying on defendant's ability to give the promised security or to pay for it, or whether he merely parted with the possession, reserving the right to retake the property into his own custody in the event of defendant's failure to perform his agreement. The jury by their verdict have found that the plaintiff only parted with the possession, and though they would have been justified in finding otherwise, I cannot say that the verdict is so clearly wrong that it should be set aside, or in fact that it is wrong in any respect. The defendant's counsel has moved against the verdict on the ground of misdirection, but what the misdirection consisted in is not stated, and I am unable to discover it on the learned judge's notes. I think, therefore, the rule must be discharged with costs.

BURNS, J., concurred.

Rule discharged.

HAMMOND V. SMALL.

Promissory Note—Consideration—Verbal understanding—Church Society.

A promissory note, promise to pay the Church Society of the Diocese of Toronto, or bearer, £50, with interest, toward providing a fund for the support of a bishop of the western diocese of Canada, who should be appointed in pursuance of an election by the clergy and laity—

Held, to be founded upon a sufficient consideration, and recoverable in the hands of a *bona fide* holder.

The jury having found for defendant, on evidence, improperly received, of an alleged understanding that defendant should be called upon for the interest only, a new trial was granted.

It was objected that the Church Society had no power to hold or transfer notes; but *held* immaterial, the note being payable to bearer.

The plaintiff sued, as bearer, upon a note given by defendant, on the 21st of October, 1856, whereby he

promised, for value received, to pay to the Church Society of the diocese of Toronto, or bearer, the sum of fifty pounds, with interest, towards providing a fund for the support of a bishop for the western diocese of Canada, who should be appointed in pursuance of an election of the clergy and laity of the diocese ; and the declaration alleged that the note was transferred to the plaintiff, who became the lawful holder thereof, and the defendant did not pay the same.

The defendant pleaded—1. That he received no value or consideration for the making of the instrument in the declaration set forth, and that the plaintiff had notice of that before the same was transferred to him.

2. That the said instrument was obtained from him by misrepresentation, and under certain promises and pretences, and that the same was well known to the plaintiff before the said instrument in writing was transferred to him. Issue was joined on these two pleas.

At the trial, at London, before *Robinson, C. J.*, it appeared that the Church Society of the diocese of Toronto, incorporated by statute 7 Vic., ch. 68, had passed a by-law, according to the provisions of which this note was taken. The imperial government had declared its readiness to concur in dividing the diocese of Toronto, by erecting the western part of it into a separate see, so soon as an adequate fund should be provided for the support of a bishop. A sum had been named by the government as being necessary to be raised for this purpose, and it was explained that the amount might either be raised in money, to be invested to the satisfaction of the government, or secured upon land, at the option of the contributors to the fund.

A deputation of gentlemen was accordingly appointed to receive contributions from members of the Church of England, by taking promissory notes, payable to the Church Society in six months : and the direction to them was, that the subscribers of sums above £20 were to have the option of giving notes in such a form, that at the expiration of the six months they should be at liberty to take up their note by giving a mortgage or rent-charge upon land, such as would cover the annual payment of the legal interest on the sum subscribed.

In most cases the option was expressed upon the face of the written instrument, as it was in the case of *Going v. Barwick* in this court (a), which of course prevented the instrument being regarded in law as a promissory note. In other cases, the option was not expressed in the instrument, but the gentlemen who took the note from the several subscribers made a minute, in a book carried round by them, that the note was given to them upon that condition. Such an entry was made in the book respecting the note sued on in this action.

Mr. Lawrason was treasurer of the fund, and all the notes were placed in his hands. He divided them properly into two classes—namely, cash notes, or notes payable absolutely, according to their tenor, and land notes, or notes which contained a condition on the face of them that they were to be given up to the parties if, at the end of the six months, they should choose to substitute a mortgage for them.

This latter class of notes was not to be negotiated, but to be kept in hand, in order that they might be exchanged for security upon land, if required. The book mentioned was not given to Mr. Lawrason, but only the notes; and he, naturally assuming that all those which were like this defendant's, absolute on the face of them, were intended to be cash notes, made use of them in purchasing good mortgages by way of investment. In that way this note, before it became due, was, with other such notes and cash, transferred to the plaintiff, Hammond, for mortgages which he held to the amount of £3,000.

After the transaction with Mr. Hammond, it was found that in some instances notes which he had thus received, though on the face of them unconditional, had been taken subject to the condition; and when this was communicated to Mr. Lawrason, he had gone to the party, and taken up the note by giving him cash for it. And he would have done the same in this case, as he swore, but that when he was informed that the defendant objected to paying the note, he was told at the same time that he refused to substitute a

(a) Ante, page 45.

mortgage for it, and claimed the benefit of an alleged understanding, that he was to be allowed to go on paying the interest till he chose to pay the principal, without the further condition of securing it upon land.

As this would have made the defendant's contribution unavailable for the purposes of the fund, Mr. Lawrason did not interfere, but left the note in the plaintiff's hands, and heard no more of the matter till this action was brought. Being then referred to again, he told the defendant that if he would secure his subscription upon land, as others had done in like cases, he, Mr Lawrason, would give the plaintiff the cash for the note, and give it up to the defendant; but he would not pay any costs of the action the plaintiff had brought, which at that time were trifling, because he had merely carried his instructions properly into effect, and would neither pay costs himself nor charge them to the funds. The defendant would not pay the costs; and the suit went on.

At the trial the defendant objected, that the note was not supported by a valid consideration: that the Church Society, not being a trading corporation, could not legally hold or transfer this note; and he contended that the second plea was proved.

The learned Chief Justice held that the consideration for the note was sufficient to support it, the object of the subscription being a valuable one to the members of the church, though not of pecuniary value; though the question was one which it might be proper to consider more maturely.

He overruled the second objection, because, without determining whether the Church Society had capacity to make or indorse promissory notes, it was sufficient that this note was payable to bearer, and the mention of the corporation in the body of the note could not put the bearer of it on a worse footing than if the name of an imaginary payee had been inserted, or of an inanimate object, such as the "Ship Fortune," &c., which would not prevent the actual bearer of the note recovering.

And as to the second plea, he told the jury that the plaintiff appeared to him to be entitled to their verdict, for

according to the evidence he gave full value for the note, without any notice of the alleged understanding, in regard to which, moreover, the evidence was in strictness not admissible, for it nowhere appeared upon the note itself; and no verbal understanding, nor any memorandum upon a separate paper, nor in a book, unless made contemporaneously, and signed, could be allowed to introduce a condition contrary to what the note imported.

The jury found for the defendant.

Freeland obtained a rule *nisi* for a new trial, on the law and evidence, and because the verdict was perverse. He cited Com. Dig. Assumpsit B. 10, 11; *Hawkes v. Saunders*, Cowp. 290; *Lee v. Muggeridge*, 5 Taunt. 36; *Gibbs v. Merrill*, 3 Taunt. 311; *Trueman v. Fenton*, Cowp. 544.

Becher, Q. C., shewed cause.

ROBINSON, C. J.—As to there not being a sufficient consideration for making the note, that is an objection apparent on the face of the note, for the purpose for which it is given is expressed.

That was not an objection insisted on, I think, at the trial, but undoubtedly it is open to the party: and if we were clear that the note was invalid for want of consideration, it would be idle to disturb the verdict.

But my opinion is against that objection. I think the object of procuring such a fund as will insure the appointment of a bishop to superintend the spiritual concerns, and assist in supplying the spiritual wants of the community, is an object of value to members of the church, so as to form an adequate consideration for engaging to contribute to a fund, without which the desired object could not be attained. It so appeared to me upon the trial, and I continue to think so.

The question is, however, upon the record. It affects not only the notes given by the contributors on this occasion, but a vast number of notes and engagements entered into on similar occasions. We will not therefore dispose of it by a side wind, as it were, but leave it to be determined upon in the most formal manner, upon a motion in arrest of judg-

ment, if the plaintiff should ultimately recover, for that course would afford to the parties the benefit of an appeal.

Independently of that objection, which we assume at present to be no objection, it appears to us that the verdict cannot be maintained, for that was illegal to admit proof of an alleged understanding, not appearing on the face of the note—in other words, a parol agreement—that when it came to maturity it should not be obligatory on the maker to pay it in money, but that he was only bound to pay the interest, leaving the principal unpaid. . And, besides, it was positively proved on the trial that this plaintiff took the note as bearer, and paid for it its full value, without any notice or knowledge of the alleged understanding. We think we cannot avoid granting a new trial upon these grounds, for the jury were told that the evidence was not in law such as could defeat the plaintiff's recovery.

MCLEAN, J.—There was no evidence at the trial to support the second plea. On the contrary, it was shewn that there was a perfect understanding as to the object for which the note was given, and the option which the defendant was at liberty to exercise, as to the payment of the amount in six months, or securing the amount, towards the support of a bishop for the western diocese of Canada, as expressed on the face of the instrument itself. The verdict therefore on that issue appears to be clearly against evidence.

The defence then rests on the first plea, which alleges the want of consideration or value for the making of the note, and that the defendant had notice thereof before the note was transferred to him.

It is not alleged that the plaintiff did not pay value for the note, and if it were, it was shewn that he transferred mortgages to cover the amount of this note, and many others, which mortgages were taken as an investment for moneys paid, or for which similar notes had been given to advance the contemplated object, the support of a bishop.

The consideration for which the note was given being expressed on its face, the plaintiff of course had notice of it

when the instrument was transferred to him. He could see and was bound to take notice, that it was not a consideration in money or goods, or of any substantial or tangible nature; but though this can all be gathered from the notice which the note itself affords, it by no means follows that the consideration or object for which it was manifestly given does not form a good and sufficient consideration to support a promise. The establishment of a bishop in the western diocese of Canada depended, as appears, on a sufficient fund being raised to ensure his respectable support. All parties feeling an interest in such establishment must be presumed to expect public and individual advantage to result from it, and when they undertake to contribute their means they must be presumed to have in contemplation the services to be rendered by a bishop, and the general and individual benefits to be derived from them.

If several persons, in order to secure the services of a physician, or a teacher, or any other person, agree to give notes by which a certain sum shall be raised in order to procure these services, and notes are actually given, expressing on the face that they are given for that specific object, and such notes are placed in the hands of some individual to be paid at a particular period, I apprehend that want of value could not be urged against the collection of any such note in the hands of a holder who has paid the full amount for it, relying upon the promise of the maker to pay it at maturity.

If this be so, then I can see no reason why the consideration, which appears on the face of the defendant's note, should not be regarded as a sufficient consideration to support the promise for its payment.

An innocent holder of a note, who has paid value, may recover, though he may have obtained it with a full knowledge that there was no value as between the maker and the payee, and it is not necessary that a promissory note should express on its face that it was given for value; but if an illegal or insufficient consideration be shewn on the face of such note, it cannot in law be enforced.

It appears to me that the consideration which is shewn

on the defendant's note is a fair and reasonable consideration for such a promise, and that the services to be rendered by a bishop to the defendant and to the public at large, cannot be held to be of no value as the foundation for a promissory note. I think, under the circumstances, there should be a new trial. There are probably many cases of a similar nature, of contributions for various objects of general as well as of individual interest throughout the province, and it is desirable that the law on the subject should be settled. This case affords a fit opportunity for obtaining a decision on the subject, by carrying it into the court of appeal, should a verdict be obtained against the defendant. As it now stands, the plaintiff cannot appeal against the verdict of the jury if a new trial were denied to him.

BURNS, J., concurred.

Rule absolute.

CORBY V. MCDANIEL ET AL.

The imperial statute against lotteries, 12 Geo. II., ch. 23, held to be in force in this country.

EJECTMENT for a village lot, part of lot No. 14, in the 8th concession of Yonge, and numbered 4 in block E in Farmersville.

At the trial at Brockville, before *Robinson, C. J.*, it appeared that the lot No. 14, in the 8th concession of Yonge, belonged to Joshua Bates, who laid out part of it into village lots, which he disposed of by lottery, together with certain personal property. He was called as a witness upon the trial, and swore that the land was disposed of by lottery in Hamilton, through one Bray, as his agent, and by his direction; that the tickets were sold at 25s. each; that Bray reported to him that the plaintiff Corby had bought the ticket which drew the village lot in question in this action. The lottery was drawn on the 28th of June, 1856, and on being informed that Corby had drawn this lot, Bates executed a deed to him on the 19th of August, 1856, which was registered in the county registry, on the 28th of January, 1857.

This deed formed the plaintiff's title. The defendants did not attempt to set up any title in themselves, but objected that the sale to the plaintiff was void under the English statute against lotteries, 12 Geo. II., ch. 28, sec. 4, and a verdict was entered for defendants, with leave reserved to the plaintiff to move to enter a verdict for him, if the court should be of opinion that he was entitled to recover, notwithstanding this objection.

Boomer obtained a rule *nisi* accordingly; to which *Gal* shewed cause.

The authorities and statutes referred to are quoted in the case of *Cronyn v. Widder*, deciding the same point, ante page 356.

ROBINSON, C. J., delivered the judgment of the court.

If we had been called on to determine this case before our statute 19 Vic., ch. 49, had been passed, I cannot see upon what principle we could have determined the provisions of the British statute 12 Geo. II., ch. 28, not to be in force in this province. It certainly formed part of the criminal law of England as it stood on the 17th of September, 1792, and as it was adopted by the legislature of Upper Canada, by the Statute 40 Geo. III., ch. 1.

It has indeed been assumed to be in force, and acted upon in this court in the case referred in the argument, of *Clarke v. Donnelly*, (T. T. 5 & 6 Vic.,) which has not been printed in the reports, and of which I retain a recollection, though my note of it is not now in my hands, but it must have been in the hands of the reporter, because we find the decision of the court inserted in the digest.

Indeed, the same construction which has been taken to make the English statutes against horse-racing and other descriptions of gaming part of the law of Upper Canada, must, we think, be equally extended to the prohibitions against the sale of real estate and goods by lottery.

It is true that the legislature, by a very recent statute, 19 Vic., ch. 49, has appeared to deal with the subject as if they were unconscious that any prohibition of this species of gambling existed before, and as if they were then for the first time rendering it illegal. But that cannot of itself

authorise us to reject any part of the criminal law of England, which we must otherwise have recognised as very clearly in force in this province, though no doubt we must henceforward give effect to this statute in dealing with the subject in connection with any transaction that has taken place after it came into force.

There cannot be a plainer case of a deed being made void by the 12 Geo. II., ch. 28, sec. 4, than this. There can be no reason for any doubt that the statute has been determined to be in force here.

Our provincial statute did not take effect till the 1st of January, 1857, after the lottery had been drawn, and the deed had been executed to convey to the plaintiff the lot which he had drawn. The act therefore does not apply to this case, and if the deed was illegal and void, it can only be so under the statute 12 Geo. II., ch. 28. In our opinion that statute did extend to Upper Canada, and has had the effect of rendering the deed void which was given for carrying into effect the disposal of the lot in question by lottery.

We think the rule *nisi* must be discharged.

Rule discharged.

BOULTON AND THE TOWN COUNCIL OF THE TOWN OF PETERBOROUGH.

By-law—Interest of applicant—Publication.

An owner of real estate which has been assessed is entitled to move against a by-law, though his name does not appear on the roll.

It is sufficient, under 14 & 15 Vic., ch. 51, sec. 18, that the manner of ascertaining the consent of the electors should be prescribed by a notice attached to the proposed by-law when published, though the act says that it shall be determined *by the by-law*.

The same act directs that a copy of the by-law shall be inserted at least four times in each newspaper printed within the limits of the municipality, but the court refused to quash a by-law, under which a large sum had been borrowed, because it had been published three times only in one of two papers.

A full copy of the by-law in this case was not published, but at the time of passing a clause was added appointing a day on which it should come into operation, and directing that the debt should be payable within twenty years from that day, while in another clause the debentures were made payable in twenty years from their dates. The court, however, held, that whether the provisions of the 14 & 15 Vic., ch. 51, sec. 18, sub-sec. 3, or of the 16 Vic., ch. 22, sec. 2, sub-sec. 4, were to govern, this was an irregularity for which they were not bound to quash.

Armour obtained a rule last Michaelmas Term upon the Town Council of Peterborough, to shew cause why a certain

by-law passed by them on the 15th of September, 1857, for enabling the said Council to take £30,000 stock in the Port Hope, Lindsay, and Beaverton Railway Company, should not be quashed, wholly or in part, on the following grounds :

1. That it was not made with the consent first had of a majority of the qualified electors of Peterborough.

2. Nor was the manner in which the consent of the majority of the electors should be obtained provided in the by-law.

3. Nor was a public advertisement, containing a copy of such intended by-law, inserted four times in each newspaper printed within the limits of the said town.

4. Nor was a copy of the said by-law advertised at all.

5. That the said by-law, or some material provision thereof, was not published for the information of the rate payers before the final passing thereof, and that the by-law that was published was not a true copy.

6. That the said railway company had no authority to build a portion of the road, to aid in constructing which the said by-law was passed.

The by-law, as it was passed on the 15th of September, 1857, recited that it was necessary and expedient that the council should subscribe for and contribute stock in the capital of the Port Hope, Lindsay, and Beaverton Railway Company, for the purpose of aiding in the construction of that portion of the said railway between the village of Millbrook and the town of Peterborough, to the extent of £30,000, and that the money that should be required for paying calls upon such stock should be raised by debentures. That the annual value of the whole rateable property of the town, according to the assessment returns for 1856, amounted to £14,884 7s. That for the payment of the £30,000 and interest, as therein provided, it would be necessary to raise by special rate upon the whole rateable property of Peterborough in each year, until the whole should be paid off, over and above all other rates, the following sums in each year during the twenty years next following the passing of the by-law—namely, in 1858, the sum of £3,300, and so on through each year, to 1877 inclusive.

It then recited that the annual rate in the pound upon the whole rateable property required as a special rate for the purpose, to be levied in the next twenty years for the payment of the said £30,000 and interest, and for the creation of a sinking fund for the loan, would be as follows: namely, in each year 4s. 5½d. in the pound. And it also recited that the by-law had been approved of by a majority of the duly qualified electors of the municipality, at a meeting called and held in conformity with the statute in that behalf.

It then enacted that it should be lawful for the mayor of the said town of Peterborough for the time being, and he was thereby authorised and required, for and in the name of the Municipal Council, for the sole object and purpose of aiding in and securing the construction of the said portion of the said railway, to subscribe for and take 3000 shares in the capital stock of the said Port Hope, Lindsay, and Beaverton Railway Company, amounting to £30,000.

2. That the mayor might borrow any sum not exceeding £30,000, and bearing interest at the rate of 6 per cent., and payable in twenty years from the date of the respective debentures, the interest to be paid half-yearly.

3. That the mayor should cause debentures to be issued for the said loan in sums not less than £100 each, and to be payable either in London or Canada, as the purchaser might require, which debentures should be placed in the hands of the treasurer, and issued by him under the authority of the mayor.

4. That the money so raised should be applied in paying for the said stock, and for the purpose of aiding in and securing the construction of the said portion of the railway, and not otherwise.

5. That the debentures should all be made payable in twenty years from their respective dates.

6. That for paying the debentures and interest, the special rates imposed by this by-law should be raised and collected upon the whole rateable property of the town of Peterborough in every one of the twenty years, in addition to all other rates, which special rate should be paid to the treasurer for the time being, at the same time as other rates collected for the year.

7. That the approval or disapproval of this by-law by the qualified municipal electors of the municipality should be ascertained in *the manner pointed out hereinunder concerning the same.*

And it was enacted, lastly, that this by-law should take effect and come into operation on the 17th day of September, 1857; and the debt or loan thereby authorised to be contracted should be payable within twenty years of the said last-mentioned day.

At the foot of the copy of this by-law, as certified, was this notice:

NOTICE.

"I hereby give notice, pursuant to the statute in that behalf, that the above is a true copy of a by-law which will be taken into consideration by the council of the municipality of the town of Peterborough after the expiration of one month from the first publication thereof in the *Examiner* newspaper, published within the said municipality, such first publication thereof having been made on the 11th day of August, A.D., 1857.

"And I do further give notice, that on Thursday, the 3rd day of September, 1857, at the hour of 10 o'clock in the forenoon, a general meeting of the qualified municipal electors of the said municipality will be held in the town hall, in the said town of Peterborough, for the purpose of considering the said by-law, and approving or disapproving of the same.

"(Signed,) J. EDWARDS,
"Clerk of the Municipality of }
"the Town of Peterborough." }

Dated the 10th of August, 1857.

The whole of this (*i.e.* including the notice) was certified by the town clerk, under date of the 20th of September, 1857, to be a true and correct copy of the by-law, as passed by the town council of Peterborough, on the 15th day of September, 1857.

The applicant, Mr. Boulton, swore that he was a freeholder, and seized in fee of real property in Peterborough, for which he had been assessed, and paid taxes for 1857; that the by-law of which he annexed the certified copy "was not published four times in each of the newspapers published within the municipality of the town of Peterborough," accord-

ing to the third sub-section of the 18th section of 14 & 15 Vic., ch. 51, *but only the first seven sections thereof*, three times in the Peterborough "*Review*," published within that town, and four times in the "*Examiner*" newspaper, also published in the same town, before it was submitted to the rate-payers for their approval: that no poll was taken to ascertain whether a majority approved of the by-law, but it was merely submitted to a public meeting held under the notice attached to the by-law: that the whole of the by-law was not submitted to the ratepayers according to the 4th sub-section of the 2nd section of 16 Vic., ch. 22, but the last clause thereof, as passed by the council, was added thereto by the said council on passing it, without its ever having been published or ordered to be published for the information of the rate-payers: that in his opinion the company had no authority to make a branch railway from Millbrook to Peterborough, not having commenced it within four years the time limited by their original charter, nor within the further period of four years from November, 1852, to which the time was extended, within which latter period nothing was done towards its commencement, though one was commenced from Port Hope to Lindsay, and is now finished.

There were affidavits filed on shewing cause against this rule, that the name of the applicant was not upon the assessment roll of Peterborough for 1856 or 1857, and that no roll had yet been made up for 1858. That the line of railway from Port Hope to Peterborough was laid down and staked out during the winter of 1852 and 1853, and the work upon the road commenced before July, 1853, and about 40,000 cubic yards had been excavated, based on a contract executed on the 24th of May, 1853: that the line from Port Hope to Millbrook was made with all possible despatch under that contract, and was completed before the 1st of November, 1856: that in the fall of 1853 a line was run from Millbrook to Peterborough, being a second survey of that portion, and which line was adopted, and does not vary from the other for the first eight miles from Port Hope towards Peterborough: that £38,000 had been expended before the 3rd of February, 1858, upon that part of the line

between Millbrook and Peterborough, upon which the iron had been laid, and which would be ready for use within two weeks ; and that £26,000 had been expended on the line between Millbrook and Peterborough in the last two months.

It appeared that a pretended copy of the by-law to the end of the seventh clause, and including the notice at the foot, but without the paragraph or clause which followed that, was published on the 12th of August, 1857, by being put up in the post office, and in five principal hotels in the town : that the *same* was published in the *Examiner* newspaper, then printed in Peterborough, on the 11th of August, 1857, and three next following weeks : that at the meeting of the ratepayers, held in the town hall on the 3rd of September, 1857, at 10 o'clock, pursuant to the notice, the mayor being in the chair, and the clerk being secretary, the by-law (that is, down to the end of the 7th section), upon a motion made and seconded, was put to the meeting by the mayor, and that a shew of hands being called for, the mayor declared that in his opinion the majority of the meeting was in favour of the approval of the by-law, "which decision was not in any manner appealed from."

This was the result officially entered by the secretary in the minutes of the meeting.

In an affidavit made by Elias Burnham, it was sworn that the by-law was unanimously approved of ; and the town clerk swore to the same.

It next appeared, that at a meeting of the municipal council, on the 15th of September, 1857, it was moved and carried that a by-law, entitled, &c., (according to the printed copy published) be amended by adding thereto the following words, &c. (all that now stands in the copy of the by-law, as above given ; after the 7th clause.)

The by-law was then amended, and read a third time, and passed.

Eccles, Q. C., and *Hector Cameron* shewed cause.

Christopher Robinson supported the rule.

12 Vic., ch. 81, secs 155, 177 ; 14 & 15 Vic., ch. 109, secs.

4, 36 ; 14 & 15 Vic., ch. 51, sec. 18; 16 Vic., ch. 22; 16 Vic., ch. 49 ; Bryant and the Municipality of Pittsburg, 13 U. C R. 347, were referred to in the argument.

ROBINSON, C. J., delivered the judgment of the court.

The applicant being owner of real estate in the town of Peterborough, which has been assessed, though he is not himself on the roll as a resident inhabitant, has a sufficient interest in the matter to entitle him to raise the question of the validity of this by-law.

Then as to the objections raised by him: that has been abandoned which relates to the alleged forfeiture of the charter on account of the work not being commenced in time, and I have no doubt it could not be maintained.

The first of the other objections is, that the consent of the rate-payers had not been obtained, or rather of the qualified electors of the municipality. By this we understand to be meant that the electors were not polled; but that could not be necessary unless some one objected, and a poll was demanded. It is declared that the by-law was approved of by those present unanimously, and there is no evidence to the contrary.

2. It is objected that the manner in which the sense of electors was to be taken was not provided for in the by-law. The 18th clause of the statute 14 & 15 Vic., ch. 51, does literally provide that the manner of ascertaining the consent of the electors shall be determined *by the by-law*. But that must receive a reasonable construction. The proposed by-law could not be an actual by-law till after the consent of the rate-payers had been obtained, and it was therefore incorrect to require that the manner of ascertaining such consent must *be determined by the by-law*. When the by-law came afterwards to be passed, all that operation would be over.

We see no more reasonable way of complying with the enactment than that adopted in this case, of printing a notice of the time and place of holding the meeting at the foot of the draft of the proposed by-law, and authenticating that by the signature of the proper officers, so that the draft

of the by-law could not be seen by any one without seeing the notice.

3. As to the publication, whatever we might think it right to do where any formality as to notice has been clearly disregarded, and especially if it should appear that there was an object in omitting such formality, we certainly should not set aside a by-law of this description for any slight and perhaps accidental failure in that respect. The statute 16 Vic., ch. 49, seems designed to give to the municipality the power of aiding this railway company by passing a by-law "in the manner prescribed by, and subject to, the provisions of the statute of the same session," ch. 22. We do not see indeed that the by-law now in question was passed for raising money on the credit of the consolidated loan fund, and if it was not, then it may be said that the various provisions of that act (ch. 22) are not applicable to this by-law, and that therefore there remained a necessity for strictly complying with the 18th clause of 14 & 15 Vic., ch. 51. Still we should not quash a by-law of this kind, after it has been acted upon, on the mere ground that in one of the *two* newspapers printed in the town, the copy of the by-law was only published three times instead of four, when in the other papers it was published four times. The legislature has shewn by the later act, 16 Vic., ch. 22, that they deem a publication in one newspaper in the town sufficient; and although it may be that that is not the statute which governs in the case of this by-law, yet we should not be exercising a sound discretion in setting aside for such a cause a by-law under which a large amount of money has probably been borrowed, and already expended.

The last objection is the one most material to be considered, namely, that in fact a complete copy of the by-law was not published at all till before the meeting, for that a material clause was added to it at the time of its passing, which never had received the approval of the electors, nor been submitted to them.

The later statute, 16 Vic., ch. 22, is not so strictly expressed in this respect as the 14 & 15 Vic., ch. 51, is. It only requires that the by-law, "or every *material provision* thereof, shall be published," &c.

The earlier statute directs that *a copy of the by-law shall be published*, which no doubt by fair construction means the whole.

Now no doubt the part of this by-law which was added in the council at the time of passing it, had never been submitted to the electors or published.

It provides that the by-law shall take effect on the 17th of September, 1857, two days after its passing, and that the loan to be contracted shall be payable within twenty years of the last mentioned day.

In Bryant and The Municipality of Pittsburg (13 U. C. R. 347) we had an objection of this kind under consideration. But that was a by-law passed under the statute 14 & 15 Vic., ch. 109, sec. 16, which is more stringent in its language than either of the statutes which we are now considering; and the addition made to the by-law, after its approval, was incomparably more material.

In the shape in which this by-law was seen by the electors, it purports to be intended to come into force immediately on its passing, but on what day that would be could not be known, within a few days at least. The providing that it should come into operation *two* days after its passing did really not create a difference that we can suppose could possibly have influenced the decision of any of the electors.

The making the debt payable within twenty years from that day was apparently not consistent with the other provisions of the by-law as published and passed, for that makes each debenture payable in twenty years from its date, and if the debentures were not all issued, or at least dated, soon after the act passed, the periods would not correspond.

The councils should be very careful to comply with the statute in passing such by-laws, for where they are not they place the courts under the painful necessity of creating (as may be in some cases) very great public inconvenience, besides most injurious consequences to individuals, by quashing by-laws upon which large sums of money have been raised, and debentures issued which may be circulating even in foreign countries.

Our authority to quash by-laws, as given by the statute, is where the by-law appears to us to be either wholly or in

part illegal. This seems, as we have intimated in other cases, to have reference to what we shall find on the face of the by-law, whereas the objections we have been considering are of another character. We do not doubt our power to quash a by-law, where it is shewn to us that it has been passed illegally, as without some notice or other formality required, which appears to be essential to the right of the municipality to pass it. But where we interfere on that ground it is, as we conceive, rather under the jurisdiction vested in us at common law, than under the municipal act. And where that is the case, we have a discretion not to interfere on summary application, but leave it to the party complaining, if he pleases, to test the validity of the by-law by resisting its operation, or by bringing an action for anything done under it, as he may be advised.

And this, we think, is a case in which we should take that course.

Rule discharged.

ROGERS V. THE GREAT WESTERN RAILWAY COMPANY.

Great Western Railway Company—Goods received to be forwarded to New York—Conditions referred to in receipt—Delay beyond defendants' line—Liability.

Defendants were charged with negligence and delay in the carriage of certain furs belonging to the plaintiff, from Toronto to New York, in pursuance of their contract. Defendants' railway extended only to the Suspension Bridge, and it appeared that the goods were delivered to them, addressed to R., at New York, and a receipt given, which specified that they were received to be forwarded to such address, subject to their tariff, rules and regulations. In these conditions it was stated that, when goods were intended, after being conveyed by their railway, to be forwarded by some other means to their destination, the company would not be responsible after they were so delivered. The goods were sent on by defendants to the Suspension Bridge, and there delivered to the warehouse of the American customs, until certain documents were procured, without which they could not be sent on. The plaintiff was asked by defendants for such papers, but they were not furnished for some time, and the furs were spoiled by the delay.

Held, that defendants were not liable, for there was no contract by them to convey the goods to New York as alleged, but their undertaking was only to carry them over their own line, and deliver them to the company which was to take them on.

DECLARATION. The first count stated defendants to be common carriers: that on the 15th of June, 1857, the plaintiff caused to be delivered to the defendants, and they received two certain boxes or cases in Toronto, containing a

quantity of furs, to be carried and conveyed by the defendants from Toronto to the city of New York, in the United States, and there to be delivered for the plaintiffs to certain persons, namely, John Randall & Co., within a reasonable time, for reward. *Breach*, that the defendants did not, within a reasonable time, take care of, or safely or securely carry, the boxes, with their contents, to New York, nor there, within a reasonable time, deliver the same for the plaintiff to Randall & Co., but detained the boxes *in transitu* an unreasonable length of time, whereby the furs were damaged and spoiled. Second count, on the defendants' alleging as a breach, that defendants neglected and refused to do so, whereby the furs were lost to the plaintiff.

Pleas:—1st. Not guilty. 2nd. That the plaintiff did not deliver to the defendants, nor did the defendants receive the goods for the purposes mentioned in the declaration. 3rd. That at the time of the delivery of the goods the defendants were common carriers from Toronto to the Suspension Bridge, on the Niagara river, between Toronto and New York, and that at the time of the delivery the goods were directed to be forwarded to a place beyond the Suspension Bridge, to wit, at New York, beyond the places of delivery of the defendants, to be forwarded by some other company or conveyance to their final destination, and the defendants gave notice to the plaintiff, and the plaintiff had notice and knowledge, that the defendants would not be responsible for the goods after they had been delivered at the Suspension Bridge, and that the defendants accepted the said goods from the plaintiff, to be carried and conveyed subject to, and under, and upon the terms of the notice, and the goods were in due course of business forwarded by the defendants to the Suspension Bridge, and were there duly delivered to the other carriers from Suspension Bridge to New York, to be forwarded in due course of business by such common carriers, of which the plaintiff had notice.

Issue was joined on these pleas.

At the trial, at Toronto, before *Burns, J.*, the facts appeared as follow: the boxes of furs were forwarded from Toronto to the Suspension Bridge, in the month of June,

1857, by the defendants being directed to New York. Owing to the want of sufficient documents or information, or neglect of parties, the cases remained a long time in the custody of the New York Central Railway Company, on the American side of the Niagara river, at the Suspension Bridge, before being forwarded to New York. The furs were not dutiable on the American side of the river, but the custom house authorities required certain information of the contents of the cases and value, &c., before permitting them to be forwarded. This delay, in summer weather, caused the furs to be spoiled before they reached New York, and the question was upon whom the loss should fall.

The evidence of both parties established the following facts: The plaintiff's clerk, on the 15th of June, 1857, delivered the cases to a servant of Messrs. Hendrie & Shedden, who collected freight from persons wishing to send by the railway, and deliver the same to the defendants at their station in Toronto. The receipt given by them, and taken by the plaintiff, was in the words and figures following:—

“GREAT WESTERN RAILWAY.

Toronto, June 15th, 1857.

The Great Western Railway Company will please receive the undermentioned property, and forward it, subject to their tariff, rules and regulations, to the following address :

Mr. John Randall, New York.

No. of packages and species of goods.		Marks.	
100	97 Fox,	2 25	\$218 25
	4 X do.,	7 00	28 00
	15 Fishers,	6 00	90 00
	10 Lynx,	3 00	30 00
	40 Beaver,	2 00	80 00
	9 Coons,	75	6 75
101	336 Rats,	25	84 00
	1 Fox,		2 25
			<hr/> \$539 25

Jos. Rogers, *Consignor.*

For Hendrie & Shedden,

(Signed)

His
MICHAEL X BARREN.
Mark.

(Signed), M. R. McGEE.”

The conditions of the railway company, which were posted up in various places, to be made as public as possible, were put in evidence, and admitted. The 3rd and 11th conditions were in these words,—The company will not be responsible as follows: “3. Nor for damages occasioned by delays from storms, accidents, or unavoidable causes, or from damages from the weather, fire, heat, frost, or delay of perishable articles, or from civil commotion. 11. When goods are intended, after being conveyed by this railway, to be forwarded by some other company or conveyance to their final destination, the duplicate receipt, furnished by the consignor, must specify the same, and the articles marked accordingly. This company will not be responsible for such articles after they are so delivered.

At the time the plaintiff's clerk delivered the cases to Messrs. Hendrie & Shedden, he said he gave an invoice of the goods corresponding with the items and amounts in the receipt before mentioned, and which receipt—that is, the duplicate of it sent to the defendants—is called the shipping bill. The invoice spoken of by the plaintiff's clerk was not produced, and the precise contents of it not known. Messrs. Hendrie & Shedden were not agents of the defendants at that time, but they were furnished with printed shipping receipts to give to persons wishing to forward goods, in order that they might furnish the merchants with them. The two cases of furs were not sent from the Toronto station until the 17th of June, and when the servant of Messrs. Hendrie & Shedden delivered the boxes to the defendants, their freight agent made a memorandum on the back of the duplicate shipping bill in these words: “This is a shipping note, not an invoice. I enclose a form to fill up, which must be sworn to by you.” This memorandum was shewn to the plaintiff on two several occasions, but he thought he had done enough, as he said, to have the cases forwarded. They were forwarded on the 17th of June, and arrived at the Suspension Bridge on the 19th, and were immediately sent over the Suspension Bridge, and placed in custody of the New York Central Railway Company, which company placed them in the bonded warehouse of the customs, until

the proper documents to satisfy the customs department were forwarded. It seemed that the agent of the New York Central Railway Company apprised the defendants that the cases could not be sent forward, without the customs department having first been satisfied. On the 30th of July the defendants' clerk wrote to the plaintiff, as follows:—

“TORONTO STATION,
30th July, 1857.

Mr. ROGERS. Dear Sir,—

You will see from the enclosed that a *sworn declaration* of the value of the furs is required by the United States customs. They cannot go on without. The sooner you comply with the request, the sooner they will be released. This causes us infinitely more trouble than it does you. You will please comply at once (for your own convenience) with the request.”

After this communication was made to the plaintiff, no answer having been received, the defendants' clerk waited upon him, and informed him what was necessary to be furnished, but he refused to give anything more than he had given, and stated that he had furnished all he intended to do. However, on the same day the clerk called, or the day after, but what day that was did not appear, the plaintiff sent to the defendants a document in the following words and figures:—

“TORONTO, CANADA WEST,
15th June, 1857.

[DUPLICATE.]

I, Joseph Rogers, do hereby solemnly, sincerely, and truly affirm, that the invoice subjoined contains a just and true account of the property delivered by me to the Great Western Railway Company this day, consigned to John Randall & Co., of New York, and that the actual cost or value thereof is as therein stated—say \$539 25 cents.

(Signed.) JOSEPH ROGERS.

Invoice referred to in the above.”

(Here followed the same enumeration of articles as contained in the shipping receipt.)

The plaintiff's clerk stated that a document similar to this had been furnished originally when the goods were sent

to the defendants' station, but the servant of Messrs. Hendrie & Shedden said he got no such document, and the defendants' clerk stated that the object of the memorandum on the duplicate shipping receipt, and of the shewing it to the plaintiff, was to obtain such a document.

On the 26th of August, the defendants' clerk again wrote to the plaintiff, as follows:—

“TORONTO STATION,
“26th August, 1857.

“MR. ROGERS. Dear Sir,—

“Please peruse the enclosed advice note from Suspension Bridge (No. 341, August 25th). You will see the cause of the further delay. The bearer will wait for the invoice, and we will forward it without delay. Note Mr. Graham's remark across the note.”

The advice note contained in it was, that the cases shipped on the 17th of June, to Randall & Co., “are still detained by U. S. customs. Furs are free, and the invoice must specify the number of pieces of each kind, and their value separately. Please get consignor to do this as early as possible, and oblige,” &c.

The plaintiff took no further notice of this than by notice that he should hold the defendants responsible for the value of the furs, which notice was given them on the 30th of August.

The remark of Graham across the advice note was this: “If this is not attended to immediately the furs will be spoiled.” The freight agent of the New York Central Railway Company proved that that company took the cases on the 19th of June, and put them in the United States bonded warehouse, and that the papers produced were not such as the custom house officer would permit the cases to go forward upon. The defendants were apprised of this at once. The defendants had made inquiries why the cases had not been forwarded to New York, and were informed of the reason. The agent of the New York Central Railway Company stated that he had written to the consignees, John Randall & Company, on the 27th of July, to which no answer was received; and again he wrote another letter to the consignees, as follows:

*New York Central Railroad,
Suspension Bridge, August 25, 1857.*

JOHN RANDALL, Esq.,

Water Street, New York.

Dear Sir,—I wrote to you on the 27th of July relative to two cases furs for you, Nos. 100 and 101, received from the G. W. Railway, and shipped at Toronto, C. W., in June last. Before the cases can be cleared from the customs I shall be required to produce an invoice, specifying the number of pieces, and the different kinds, and their separate value. I wish you to write to the shipper to send me the document, so that I can dispose of the boxes. If I cannot get them cleared from customs, I will get them withdrawn from the bonded warehouse, and send them to the Great Western Railway, for them to dispose of as they may deem proper, as this company will not become responsible for any damage the furs may sustain by reason of warm weather or ravage of moths."

This witness stated that the boxes were ultimately forwarded to New York: that furs are free of duty going into the United States; and that such a document as the duplicate declaration of value before set forth, would have been sufficient to have satisfied the custom house officer to have permitted the boxes to have been forwarded.

The freight agent of the defendants in Toronto stated that when he did not receive any declaration of value from the plaintiff, as mentioned upon the shipping receipt, he called upon him about the matter, and the plaintiff then said he did not feel called upon to go to so much trouble: that he could forward furs through the express agents without that declaration; but the agent told him that though the express agents might do so, the railway company could not.

No freight was paid upon the boxes, and the carters, Messrs. Hendrie & Shedden, stated, that if any freight had been offered to be paid they would not have taken it further than to the end of the defendants' line, and then only for convenience to the shipper. The two companies kept an account with each other as to freight, which was balanced weekly.

At the close of the plaintiff's case, the defendants' counsel made the following objections:

1. That the contract declared upon was stated to be to carry

the goods to New York, whereas the evidence of the receipt and conditions only shewed a contract to carry to the end of the defendants' own line of railway, and that when the goods were delivered to the New York company the liability of the defendants ceased.

2. That the plaintiff was not the proper party to bring the action, but that it should be brought by the consignee.

The value of the damaged furs was admitted to be £100.

With a view of determining the matter finally between the parties, the learned judge put the question to the jury as one of fact, to say upon whom rested the blame of these goods not having been forwarded to New York, whether it was caused by the plaintiff not having furnished the defendants in sufficient time with the necessary documents or information to enable the cases to be passed through the custom house on the United States side of the river; or whether, if the plaintiff did furnish all that was required or necessary, the defendants neglected to give the required information in proper time. The learned judge called the attention of the jury to the fact, that it was within the plaintiff's knowledge to furnish the information, and not within the defendants' knowledge; and though they, the defendants, might have applied often for information, which perhaps had been furnished before, yet it might be said the conduct of the plaintiff was rather unreasonable in not giving them the information over again, when they were evincing a desire to have the boxes forwarded.

The jury found for the plaintiff, whereupon leave was reserved, to the defendants to move to enter a non-suit on the legal points.

Irving obtained a rule *nisi* to enter a nonsuit on the leave reserved or for a new trial.

Bell shewed cause, and cited *Muschamp v. Lancaster and Preston R. W. Co.*, 8 M. & W. 421; *Moore v. Wilson*, 1 T. R. 659; *Davis v. James*, 5 Burr. 2680; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Coats v. Chaplin*, 3 Q. B. 483, S. C. 2 G. & D. 552; *Macklin v. Waterhouse*, 5 Bing. 212; *Riley v. Horne*, Ib. 217, 224; *Duff v. Budd*, 6 Moore 469, S. C. 3 B & B. 177; *Scothorn v. South Staffordshire R. W. Co.*, 8 Ex. 341; *Pickford v. the Grand Junction R. W. Co.*, 12

M. & W. 776; Swain v. Shepherd, 1 M. & Rob. 223; O'Neill v. The Great Western R. W. Co., 7 C. P., 203.

Irving, contra, cited Dawes v. Peck, 8 T. R. 330; Collins v. The Bristol and Exeter R. W. Co., 1 H. & N. 517.

ROBINSON, C. J.—The plaintiff (the consigner) was the proper person to bring the action here, I think, because it was not proved, as it was in Dawes v. Peck (8 T. R. 330), that he was directed by the consignee to send them by the New York Central Railroad, or by the Great Western Railway. If that had been shewn, then, when the plaintiff put them *in transitu* according to his instructions, the property would have vested in the consignee, Randall, and he must have brought the action.

But though the plaintiff, for all that appears to have been proved, was the person entitled to sue for such a cause of action as he sets forth, yet I think he failed to prove such a contract as he alleged, for the way-bill signed by the plaintiff, and by the person who received the goods on behalf of the company, did not specify that the defendants received the goods to be carried by the defendants to New York, or to be delivered by them there to the consignees; nor did the plaintiff deliver them upon such an understanding on his part, for it is expressed in the bill that the defendants received the goods to be forwarded, "*subject to their rules and regulations.*" If the plaintiff did not in fact know what these rules and regulations were, it behoved him to enquire, for he saw that the goods were not received unconditionally. And it does not seem to have been contended at the trial, that the plaintiff was not aware of the printed regulations, which the defendants had promulgated. If that had been contended, it would have been left to the jury to determine, unless it had appeared to the judge, as I think it probable it would, that the reference in the way-bill to the regulations of the company, threw it on the plaintiff to enquire into the regulations, by making them binding nevertheless upon him, if he waived the enquiry.

The printed regulations shewn do import, I think, though not with the clearness that one would have expected, that

with respect to goods forwarded by the defendants to places beyond their own line, they only undertake to deliver them to those who are to take charge of them at the terminus of their railway.

Even if no such condition had been shewn to have formed part of the contract, I should have been of opinion that the defendants only undertook to put the plaintiff's goods in transitu on the line leading from the Suspension Bridge to New York, not to carry them to New York, and deliver them there, for which it is proved no reward was to have been paid to them.

Then as to the enquiry gone into upon the trial, in order to prove or disprove the statements contained in the last plea. It appears to me, if it were necessary to determine upon that point, that according to the evidence it was not the fault of the defendants, that the goods were detained at the American custom house, but that it was either wholly the fault of the plaintiff, or as much or more his fault than the fault of the defendants, that the goods were so detained, and in either case the plaintiff would be disabled from recovering.

In my opinion the plaintiff did not prove the contract to be such as he set out, and on that account a nonsuit should be entered.

It seems to me, also, that the last plea was proved.

BURNS, J.—The question in this case, though an important one to the mercantile community, seems to me a very simple one, and involved in truth in no difficulty. The plaintiff has declared against the defendants as common carriers, and upon a contract as if to carry his goods from Toronto to New York. The question is, whether that allegation is sustained by the evidence. The receipt given on behalf of the defendants,—that is, assuming that in fact Messrs. Hendrie & Shedden were their agents for the purpose of making the contract at all,—shews that the packages addressed to the consignees in New York, were received at Toronto to be forwarded by the defendants, subject to their tariff, rules and regulations. The plaintiff knew when the packages were

delivered that the defendants' line of railway extended no further than the Suspension Bridge on the Niagara River, and that, in order to reach New York, it would be necessary that the goods should be forwarded in some other method than by the defendants' railway. Another fact he also knew, and that was, that though the contents of the packages were not liable to duty on crossing the frontier of the United States, yet it was necessary, as he was the consigner, that he, or some one for him, should give the customs authorities in the United States such information as would enable the parties taking charge of the packages to carry forward from Canada goods crossing the line. Under these circumstances, can the receipt for the packages be construed as a contract to carry from Toronto to New York? No freight was paid or even spoken of, so that no contract or implied duty can be implied from payment of freight against the defendants, as common carriers beyond their own line. The goods were safely and securely carried on their line, within a reasonable time, and delivered to the New York Central Railway Company, and so far the plaintiff has nothing to complain of against the defendants; but his complaint is that he gave the defendants sufficient information to enable them to pass the goods through the custom house in the United States; that it was a part of their duty, or part of their contract, to carry all the way to New York; that he himself was under no obligation to see that his goods passed the custom house, and that the defendants must be treated as the carriers the whole way to New York from Toronto.

The 11th condition, of which the plaintiff was aware, certainly was not complied with on his part, for the packages were not marked to be forwarded in any particular manner beyond the defendants' line, but were simply marked for New York, and the plaintiff relies on the cases of *Muschamp v. the Lancaster Railway Company* (8 M. & W. 421), and *Scothorn v. the South Staffordshire Railway Company* (8 Ex. 341), to establish that the defendants must be treated as having undertaken to carry the whole way to New York, upon a receipt framed as the one in this case is. It will be observed the receipt is not that the packages were received

by the defendants to be *carried* or *conveyed* to New York, but the expression is that they were to be *forwarded*. The very fact of receiving the goods would of course imply a contract, and impose a duty on the defendants to carry over their own line ; but the question is whether the receipt being to forward the goods implies a contract or duty to carry beyond their own line. The case of *Collins v. the Bristol and Exeter Railway Company* (11 Ex. 790), and upon appeal (1 H & N. 517), affords a very satisfactory solution of the present case, and shews that though the case of *Muschamp v. the Lancaster and Preston Railway Company*, and others of a similar character, are good law, yet the principle is not to be extended beyond the meaning of the words, to *carry* or to *convey* to the place of destination. If one contracts to carry or convey to a certain place, he must do so, though it may be necessary to employ several companies or persons on the intermediate routes to accomplish it. We are now asked to put the same construction on the contract to *forward* goods. The abstract meaning of the word *forward* will not of itself imply any such meaning. Then if we resort to the surrounding facts and circumstances, which are resorted to sometimes to interpret the meaning of words, we should put a construction upon the word directly at variance with the stipulations contained in the 11th condition, which was imported into the receipt, though in fact no memorandum was made that the goods were to be sent forward by another company.

If we should hold that the receipt to forward imported a contract to convey all the way from Toronto to New York, then we must also necessarily hold that it was part of the defendants' contract and duty to have caused these packages to pass the custom house on the United States frontier. I cannot imagine for a moment that it can be seriously contended such a duty is imposed upon common carriers. They know nothing of the contents of packages further than the consigner chooses to make them acquainted with them. The duty of goods passing the customs, and being relieved there, must rest upon the persons forwarding them, and their agents, unless provided for by the contract. The receipt relied upon

to forward the packages to New York, cannot imply any contract on the part of defendants to perform the duty of passing the goods through the Customs, and, independent of that fact, there is nothing in the evidence to shew that the defendants undertook that duty. They did endeavour to procure the necessary information from the plaintiff, but he thought he had given them enough. He seems to have thought that the defendants, if they did not contract to pass the goods through the customs, yet were his agents for the purpose, and that they were answerable. If the defendants were his agents they could only be liable in that capacity for a neglect of their duty, but such an agency cannot be incorporated upon a contract to forward goods, without something more specific than appears on the face of the receipt given in this case.

The rule should be absolute to enter a non-suit.

MCLEAN, J., concurred.

Rule absolute.

GILDERSLEEVE V. AULT AND FRIEL.

Distress—Exemption—Goods in the way of trade—Sale of goods—Change of possession.

M., a ship-builder, carried on his business in a yard leased from A. The plaintiff sent two vessels there to be repaired, but M. not having sufficient means, it was agreed that the plaintiff should furnish the materials, and he purchased from M. for the purpose some oak timber then in the yard. The plaintiff's foreman took possession of it, and a portion had been worked up by the plaintiff's and M's. men, when A. distrained both it and the vessels for rent.

Held, that there had been sufficient change of possession of the timber to dispense with a registered assignment; and that both it and the vessels were exempt from distress.

SPECIAL CASE, stated for the opinion of the court, as follows:

This was an action of replevin brought by the plaintiff against the defendants, for the taking and unjustly detaining the steamboat "New Era," the yacht "Belle of Kingston," and a quantity of oak timber of the plaintiff.

And by consent of the parties, and by order of the honourable Mr. Justice *Richards*, one of the judges of her Majesty's Court of Common Pleas, at Toronto, dated the twenty-second day of May, 1858, according to the Common

Law Procedure Act, 1856, the following case has been stated for the opinion of the court, without any pleadings.

1. The defendant George Nelson Ault, being possessed of a certain marine railway and ship-yard, in the township of Kingston, in the county of Frontenac, called and known as the Portsmouth Railway, let the same to one Robert McCord, at a yearly rent of £225, payable quarterly in advance.

2. That the said Robert McCord entered into possession of the said premises, and carried on the public trade or business of shipbuilding and repairing there.

3. That while the said Robert McCord was so in possession, and carrying on the business as aforesaid, the said steamboat "New Era," and yacht "Belle of Kingston," of the plaintiff, were brought to the said premises, for the purpose of having certain repairs done thereto by the said Robert McCord, in the ordinary course of his trade or business carried on there.

4. That it was in the course of his trade and business for the said Robert McCord to furnish materials as well as labour necessary for building and repairing vessels built or repaired at said premises; but that in consequence of his want of pecuniary means at the time of the required repairs to the said steamboat and yacht, he was unable to supply all the materials required, and the plaintiff, by agreement with the said McCord, undertook to supply the materials required, and to allow the said McCord the customary price of labour in working up the same on the said premises for the purposes of such repairs. That a portion of the material required for such repairs was oak timber.

5. That the said Robert McCord, then the owner of the oak timber in question in this cause, and then having the same on the said premises, for a valuable consideration sold and delivered possession of the same to the plaintiff, for the purpose of having the same used in repairing the said steamboat and yacht; and the said timber was thereupon taken possession of by the foreman of the plaintiff, for and on behalf of the plaintiff; and after the said sale and delivery

to the plaintiff, and while the said oak timber was being worked up and manufactured, and after a portion of the same was prepared to be so worked up by the said McCord and his workmen, and the workmen of the plaintiff, and until and after the same was distrained as hereinafter mentioned, the said steamboat and yacht were on the said premises for the purpose of being repaired as aforesaid, and the said timber also remained on the said premises for the purpose of being used and worked up, and a portion of it had been used and worked up by the said Robert McCord, and the workmen of the plaintiff, in repairing the said steamboat and yacht of the plaintiff.

6. That on the seventh day of January, 1857, while the said steamboat, yacht, and timber were on the said premises, for the purpose aforesaid, and while the said repairs were being made, and before the same were completed, and while the said steamboat, yacht, and oak timber remained on said premises, and more than five days after the sale and delivery of the same timber to said Gildersleeve, as aforesaid, the sum of £112 10s. for the rent of the said premises became due, and was in arrear to the said Ault.

7. That the defendant, James Friel, as the bailiff of the defendant Ault, distrained upon the said steamboat, yacht, and timber, for the said rent, and thereupon the plaintiff replevied the same.

8. That no bill of sale of the said timber from the said Robert McCord to the plaintiff has ever been filed in the office of the clerk of the county court of the united counties of Frontenac, Lennox, and Addington.

The question for the opinion of the court is, whether the said steamboat, yacht, and timber, were, or either of them was liable to be distrained, under the circumstances above set forth?

If the court should be of opinion in the affirmative as to all or any two of them, then judgment shall be entered for the defendant, for the amount of the said rent so due and in arrear, with the costs of defence; but if the court should be of opinion that the steamboat and yacht were not liable to be distrained, but the timber was liable, then judgment

shall be entered for the value of the said oak timber, which is admitted to be £60 3s. 9d., and the costs of defence, less the plaintiff's costs of replevying the said steamboat and yacht; but if the court should be of opinion that neither the said steamboat, yacht, or timber, were so liable to be distrained, then judgment shall be entered for the plaintiff for one pound and costs of suit.

Draper, for the plaintiff, cited *Gisbourn v. Hurst*, 1 Salk. Simpson v. Hartopp, Willes 514; *Parsons v. Gingell*, 4 C. 249; B. 545; *Woodf. L. & T.* 370; *Brown v. Shevill*, 2 A. & E. 138.

Hector Cameron, contra, cited *Gibson v. Ireson*, 3 Q. B. 39.

ROBINSON, C. J., delivered the judgment of the court.

As regards the steamer and the yacht, we do not find in the case the least room for doubting that they were privileged from arrest, for they were the property of the plaintiff sent to the tenant to be repaired by him in the way of his trade, and while they were being so repaired they were seized for rent due by the tenant. These surely come within the exemption, taking it in its strictest sense.

With respect to the oak timber, the circumstances were in certain particulars different. That had lately before been the property of the tenant, but before the rent fell due (which we think is not a material point in the case), it was sold by the tenant to the plaintiff, and put in the possession of the plaintiff's foreman, and it was to be used by the tenant and the plaintiff's workmen in making the repairs, and being the property of the plaintiff was left on the premises for that purpose, and was seized after a part of it had been applied in such repairs, and while the rest was in the course of being so applied. If this oak timber then was the plaintiff's property when seized, we think it was privileged by the same rule that privileged the vessels.

If the plaintiff had bought that timber anywhere else, and sent it there to be applied by the tenant in making the repairs, we assume that there would have been no doubt that it would have been exempt from distress, and that the only room for question can be whether it was in fact the plaintiff's property.

It is conceded that it was actually sold, and not merely pretended to be sold to cover it from distress. If anything of that kind was intended to be set up, the parties must have gone before a jury, or at least the case must have been differently stated.

But the defendant is at liberty to contend, as he has done, that the property did not pass by reason of the non-registry of any assignment of it, inasmuch as the possession was not changed.

We think we must hold, upon the case stated, that there was no occasion for a registered assignment, for it is admitted that the timber had been sold and delivered to the plaintiff, and taken possession of by his foreman. Its being allowed to remain on the same premises is accounted for by the circumstance that it was wanted there for the purpose of the vendee, to be worked up in repairing the vessels which were also there, and it would be unreasonable to ascribe such an intention, and give such an operation to the act, as would have made it necessary for the vendee to have taken it home or elsewhere, and to have sent it plank by plank as it was wanted.

Judgment for plaintiff.

OWSTON V. WILLIAMS ET AL.

Deed—Construction—Habendum inconsistent with premises.

Under a conveyance to A., her heirs and assigns, *habendum* to A., her heirs and assigns, and in case of her decease leaving issue, then in trust to O. (her husband,) his heirs or assigns, to and for the benefit of the said children, their heirs or assigns, to be sold for their benefit, if the said O., his heirs or assigns, should think fit; and if the said A. should not survive the said O., leaving no issue, then to the said O., his heirs and assigns for ever.

Held, that the *habendum* being inconsistent with the premises, the former must govern, and that A. took a fee.

EJECTMENT for six town lots in Port Hope.

The plaintiff claimed as tenant by the courtesy of England. On the 5th of May, 1830, John Tucker Williams, being seized of this land, made a deed of bargain and sale, whereby, in consideration of £120, he granted, bargained and sold to Agnes Owston, wife of the plaintiff, *her heirs and assigns for ever*, all the lots now in question, together with all houses,

outhouses, &c., and the reversion and reversions, remainder and remainders, &c., "*to have and to hold* the same to the said Agnes Owston, her heirs and assigns, and in case of her decease leaving issue, then in trust to the said Thomas Owston, his heirs and assigns, to and for the benefit of the said child, or children, his, her, or their heirs or assigns for ever, to be sold and disposed of for his, her, or their benefit and advantage, if he, the said Thomas Owston, his heirs or assigns, shall think fit and proper so to do. And if the said Agnes Owston should not survive the said Thomas Owston, leaving no issue, then to the said Thomas Owston, his heirs and assigns for ever."

Agnes Owston died on the 2nd of November, 1850, in the lifetime of her husband, the plaintiff, leaving issue by him.

On the 1st of February, 1854, the interest of the plaintiff in this land was sold by the sheriff, under several executions against him, and John Tucker Williams became the purchaser, and received a deed from the sheriff. The defendants were the executors under the will of J. T. Williams, who had died in the meantime.

A special case was stated for the opinion of the court, and the question was, whether the plaintiff had a legal interest in this property, as a trustee under the terms of the *habendum*, or whether he took as tenant by the courtesy, in which case his interest passed under the sheriff's deed to the defendant's testator.

Christopher Robinson, for the plaintiff, cited *Smith on Property*, 133; *Burton on R. P.*, 122, 152, 172; *Co. Lit.* 30 a; *Shep. Touch.* 101-2, 113; *Cruise Dig.* IV. 272.

Stephen Richards, contra, cited *Doe dem. Meyers v. Marsh*, 9 U. C. R. 242; *Robertson v. Norris*, 11 Q. B. 916.

ROBINSON, C. J., delivered the judgment of the court.

It would have seemed the most reasonable rule, that in grants, as well as in wills, or executory written contracts, the court should be allowed to be governed by the manifest intention of the party executing, to be gathered from the whole of the instrument—that he should be allowed to explain his intention as he proceeded, and if at the end he left it

plain what he intended, that effect should be given to his deed according to his intention, when the disposition made by him was such as he had power to make. But no doubt it has been a rule very early laid down, that a deed is to be construed most strongly against the grantor, and that when he has by the premises in the deed most plainly granted an estate to A. and his heirs, he cannot retract that disposition by using words in the *habendum* utterly inconsistent with the grant of such an estate.

The principle is fully laid down and discussed, with all its exceptions, in Baldwin's case (2 Co. 23 b.) I refer also to Sheppard's Touchstone, 102, 113, and to 4 Cruise's Digest, 433.

We take this to be the case in which we cannot avoid admitting that, if full effect should be given to the *habendum*, then the word "heirs" used in the premises, and indeed in the first part of the *habendum* itself, could have no meaning given to it, for if Mrs. Owston died leaving children, then according to the *habendum*, the estate would go to her husband Thomas Owston, or his heirs, in trust for such children, and they would take no legal estate, and if she died without issue in his lifetime, then the estate was to go to her husband in fee; all of which is utterly inconsistent with the premises, and cannot be taken as an explanation of the description of heirs that were meant by the premises.

We do not see that this case can be distinguished from Doe dem. Meyers v. Marsh, decided in this court (9 U. C. R. 242), to which we think we must adhere, for the case of Doe dem. Timmis v. Steele (4 Q. B. 663), and other cases, shew that the principal is still maintained to such an extent as we have mentioned. In our opinion the plaintiff must be nonsuited, for he could only claim under the *habendum* as trustee for the benefit of the children, which he cannot be, unless we could hold that the effect of the *habendum* was to cut down the estate in fee granted to Mrs. Owston by the premises to an estate for life; or as tenant by the courtesy if his wife took a fee, and if he held such an interest it was sold under the execution.

Judgment for defendant.

MULLIGAN V. WRIGHT.

Arbitration—Submission by executor—Power to bind him personally.

On a submission between A. and defendant, describing himself as executor of B., of all matters in difference between the said parties in reference to the business carried on by the said A. and B. in partnership, with liberty to the arbitrators to order and determine what they should think fit to be done by either of the parties respecting the matters referred. *Held*, that the arbitrators had power to order a sum to be paid by defendant absolutely, not merely to bind him as executor.

Action on an award, made on a submission under seal, by which it was directed that defendant should pay to the plaintiff £161 6s. 3½d. Defendant pleaded no award.

The case was undefended at the trial, which took place at Whitby, before *Draper*, C. J., and the plaintiff recovered a verdict for £167 1s. 1½d.

The agreement to submit was entered into on the 18th of September, 1857, between the plaintiff and the defendant, described therein as administrator of Reid Wright, deceased.

It recited difference between the parties "in reference to the business formerly carried on at Tullamore, between the plaintiff and the said Reid Wright, in his lifetime, under the name and firm of Wright and Mulligan;" that the said matters in difference were by mutual submission, on the 17th of June, 1857, referred to Isaac M. Chaffey, Joseph Figg, and George Wright, as arbitrators, who on the same day made their award; but that, it having been ascertained that certain transactions in the said business had not been adjudicated upon by the arbitrators, it had been agreed between them that the said submission and award should be set aside, and a new arbitration entered into *in respect of all matters in difference between the said parties*; and the agreement witnessed that the parties did thereby refer to the three arbitrators named therein, or any two of them, "all matters, of what nature or kind soever, in difference between the said parties, in reference to the business carried on by the said Joseph Mulligan and the said Reid Wright, deceased, in partnership, under the firm and name of Wright and Mulligan, or arising out of the said business, or in any manner connected therewith." The arbitrators "to be at liberty to

order and determine what they shall think fit to be done by either of the parties respecting the matters referred."

On the 19th of September, 1857, the three arbitrators awarded to Joseph Mulligan £161 1s. 3½d. "to be paid within three months by Joseph Wright, his heirs, &c. All notes or accounts now in the hands of Mulligan, not collected, to be his, Mulligan's property, and if any defalcation in their payment, Wright is to pay one half of such defalcation, and Mulligan is to have 25 per cent. on the amount collected, upon rendering a true account of the whole amount.

Cameron, Q. C., obtained a rule *nisi* for a new trial, on the law and evidence. He contended that the award was not justified by the submission, and was bad in law.

Crombie shewed cause, and cited *Doe Wheeler v. McWilliams*, 3 U. C. R. 165; *McMahon v. Campbell*, 2 U. C. R. 158; *Gun v. Van Allen et al.*, 5 U. C. R. 513; *Russ. on Arb.* 33-4, 523, 576.

ROBINSON, C. J., delivered the judgment of the court.

The case being undefended at *nisi prius*, the plaintiff produced and proved his award, and recovered. No affidavits were filed accounting for the absence of the defendant or his attorney, and it is not alleged that there was any unfairness or surprise in the manner of the case being brought on, or that the fact of there being no defence arose from any accident. It has been stated that the defendant's attorney conceived that under the plea of "no award," he could not take the exception which he now wishes to take, and therefore did not attempt to defend the case at the trial.

If we saw that he was under any misconception in this respect, we should not as a matter of course open the case, but should only do so upon its being shewn, which it is not, that the verdict is unjust, or that for some good reason this defendant ought not to be made to pay it. Nothing of that kind is shewn, for no affidavits are filed, and having only the record and the award before us, we can see no ground for interfering.

The defendant did not limit the submission to his representative character; that is, he did not enter into the sealed

agreement of submission *as* executor; he merely added that description to his name. Now this is not like some of the cases referred to, in which it was recited that differences had arisen between the testator and the other party to the submission. It is stated here that differences had arisen between the plaintiff and the defendant, *and all matters in difference between these parties* were referred, which had any reference to the partnership business between the plaintiff and the defendant's testator, or which had arisen out of, or were in any manner connected with it. Now it might have even been a matter of difference between these parties, whether the defendant had not rendered himself pecuniarily liable for any balance that might be found due from the estate; that is, liable either by his engagement to pay it, or liable otherwise from his conduct as executor.

And besides, the arbitrators had powers expressly given to them to order whatever they should think fit to be done by either of the parties in reference to the submission, and it is clear from several adjudged cases, that upon a reference such as this is the arbitrators might award a sum to be paid by the executor absolutely, where (as in this case) he has not guarded himself by limiting the submission in such a way as could only make the award applicable to him in his representative capacity. I refer to *Riddell v. Sutton*, Exr. (5 Bing. 200), *Barry v. Rush* (1 T. R. 691), *Pearson v. Henry* (5 T. R. 6), *Worthington v. Barlow* (7 T. R. 453), and to *Robson's case* (2 Rose, 50).

The utmost the defendant can contend for is, that the arbitrators might have directed the money to be paid out of the assets of the estate, but they have not done so, and we cannot assume that they ought to have done so; and if from anything which the defendant has in his power to shew they ought to have made their award binding only upon him in his representative capacity, then he ought to have moved against the award in proper time upon that ground. As the case stood, the plaintiff upon the issue of "no award," had nothing to do but to prove the award. If on the face of it it was bad (which I do not think it was), it is now held that the defendant should have demurred, or moved in arrest of

judgment. If it could be shewn to be bad by alleging and proving something extrinsic, as in *Wade v. Dowling* (4 E. & B. 44), and *Regina v. Bowen* (8 M. & W. 625), then it was for the defendant to shew such matter; but for all that appears this award was not invalid, and we are therefore of opinion that the rule must be discharged with costs.

Rule discharged.

REGINA V. DAVENPORT.

Right of Crown to grant ferry—Lease during pleasure—Second lease of same ferry—Apportionment of rent—Use and occupation.

The Crown, on the 23rd of February, 1838, granted a lease to D. of "our ferry across the river Detroit, from Windsor to Detroit," during pleasure, at an annual rent, payable on the 24th of June. On the 14th of March, 1843, a precisely similar lease of the same ferry was granted to B., and it was proved that from that time B. had used the ferry, greatly to D.'s injury.

Held, that the second lease revoked the first: that D. was liable for rent only up to the then last yearly day of payment mentioned in his lease; and that he was not liable for the use and occupation had afterwards.

Held, also, affirming *Kerby v. Lewis*, 6 O S. 207, that the Crown had clearly the right to grant an exclusive ferry across the Detroit river.

SPECIAL CASE. On the first day of Hilary Term, 1857, a commission issued out of this court, directed to Robert Gladstone Dalton and Matthew Crooks Cameron, Esquires, authorizing them to enquire whether Lewis Davenport, late of the village of Windsor, deceased, was at the time of his death indebted to the Queen, in any and what sums of money, arising out of rents for the ferry across the river Detroit, from Windsor to Detroit.

On the 12th day of February, 1857, it was found by inquisition of that date, had pursuant to the said commission, that Lewis Davenport, in the said commission named, was, on the "day of the date of his death, indebted to our Sovereign Lady the Queen in £182 10s., for so much money arising from the rents due by him to her Majesty for her Majesty's ferry across the river Detroit, from Windsor to Detroit."

On the 28th day of February, 1857, the said commission and inquisition having been duly filed, a writ of *diem clausit extremum* issued out of this court, directed to the sheriff of the county of Essex, under which he seized certain lands and

tenements particularly mentioned in the record of *nisi prius* in this cause.

On the 10th day of September, 1857, the defendant Lewis Davenport, by George Alexander Philpotts, his attorney, appeared and claimed the said lands and tenements, &c., to belong to him, and pleaded that Lewis Davenport, deceased, was not, at the time of his death, indebted to her said Majesty the Queen, in manner and form as in the said commission and inquisition alleged, and prayed that her Majesty's hands might be moved, &c.

Upon this plea issue was joined.

At the trial, at the last assizes for Toronto, before the Chief Justice of the Common Pleas, the plaintiff put in an exemplification of a lease from the Crown, dated the 23rd day of February, A.D., 1838, to Lewis Davenport, of the ferry, describing it as "our ferry across the river Detroit, from Windsor to Detroit." *Habendum* to said Lewis Davenport, his executors, administrators and assigns, during our pleasure; rendering rent, £20 per year, first payment on the 24th of June, 1838.

The lease contains various conditions, particulars of which appeared in the exemplification filed. The plaintiff also proved that the said Lewis Davenport, during his lifetime, (he died in September, 1848) used the ferry, enjoying certain privileges in respect thereof, being only required to make one custom house entry a day, instead of entering every trip of his ferry steamer, and that in May, 1839, £15 17s., and in October, 1840, £12 10s. were paid by him on account of this rent.

And the plaintiff claimed rent up to the time of Davenport's death, which (giving credit for payments) counsel agreed amounted to £187 10s.

For defendant was put in a certified copy, admitted as an exemplification, of a lease of the same ferry from the Crown to one Francis Baby, dated 14th March, 1843, and precisely similar in the description of the thing demised, rent reserved, conditions, &c., to that granted to Davenport; and it was proved that on Baby getting this lease he at once commenced to ferry, running first with a scow for teams,

and a small boat for passengers, and afterwards with a steamer built by him for that purpose, from a wharf at Windsor from which Davenport formerly ran his boat, and about 200 feet distant from Davenport's ferry wharf, to the same wharf in Detroit to which Davenport's ferry boat ran, and that Baby had ever since continued said ferry: that it operated very injuriously to Davenport, so that for a long time his ferry boat did not pay expenses, until arrangement was made between Baby and Davenport to charge a higher and uniform rate of fare. It was also shewn that the customs collector at Windsor, acting under instructions from the government, allowed Baby's ferry the same privilege of daily entry which had been allowed to Davenport; and that, after Baby's ferry boat commenced her trips, other boats were occasionally run in opposition by persons who claimed that the ferry was free, there being no exclusive right claimed in Detroit for the privilege of running to and from the wharf there, and that for the past year such a boat had run regularly. Defendant also put in an exemplification of a subsequent lease from the Crown to Baby, dated in 1849, for a definite period, *i. e.*, for seven years, at an increased rent, *i. e.*, £37 15s. per year, and Davenport submitted,—

1st. That the Crown had no right to the ferry, it being to a foreign country.

2nd. That the lease to Baby determined Davenport's term, and operated as a revocation of his lease during pleasure, and that therefore at all events the plaintiffs could not recover rent after 1842.

To which the plaintiff replied, as to the first point, that the Crown had the right; and if not, that defendant was estopped by the lease.

And as to the second point, that the ferry demised to Baby was a different ferry from that demised to Davenport, and that at all events the plaintiffs could recover for the use and occupation, of which evidence had been given.

And a verdict was taken by consent for the plaintiff for £66 13s., which counsel agreed was the amount of rent due (crediting payments) up to the date of Baby's lease, subject

to the opinion of the court, and to be reduced by £15 if the defendant should be held not liable for a proportion of the rent 1843, the year in which the Baby lease was made; or to be increased to any amount not exceeding £187 10s., which was the amount of rent calculated up to the death of the lessee, Davenport; and with leave to enter a verdict for the defendant.

The questions for the opinion of the court are,—

1st. If defendant is not estopped, whether the Crown has the right to grant the ferry?

2nd. Whether the license to Lewis Davenport, of date 1838, was revoked and made void by the license to Francis Baby, of date 1843?

3rd. If so, whether, notwithstanding having used the ferry, and having claimed and received ferry privileges after the revocation, he did not become indebted to the Crown for the use and occupation?

4th. If not, whether he was not liable under his license for the rent which accrued due before its revocation in 1843?

5th. And if so, whether he was not liable for the fraction of the year which accrued between June, 1842, when his fourth year expired, and April following, when the license to Francis Baby took effect?

R. A. Harrison, for the Crown, cited *Thompson v. Brown*, 7 Taunt. 669; *Pim. v. Curell*, 6 M. & W. 234.

Prince, contra, cited *Woodf. L. & T. 157*; *Platt on Leases*, I. 654–6.

ROBINSON, C. J.—We cannot find an authority determining what shall be the effect, as regards the claim for rent, of the Crown making a demise to a second lessee of the same premises which had been before demised, and during the existence of the first term. Indeed we could not expect any adjudged case of the kind, as it would seem to be a strangely inconsistent thing for the Crown to do, and has not been done in this case, for the first lease was not for a certain term, but during the pleasure of the Crown.

My opinion is, that the second lease or license in this case revoked the first, and that the Crown cannot, under such cir-

cumstances, claim rent after the disturbance of the right of ferry which has taken place by its authority. There would be no satisfactory means of measuring what amount of rent would be just to exact, even supposing that a recompense could be recovered, as for use and occupation, under the circumstances, since it might well be that, although the first lessee might have continued to receive something considerable, notwithstanding that the other lessee was at the same time plying under his lease from the Crown at the same place, yet the receipts (of which only a very uncertain estimate could be formed) might not exceed or equal the charge of maintaining the ferry.

But besides this, the first lessee could not be said to be enjoying *by permission of the Crown* after the second lease was made, since by that lease or license to Baby the Crown in effect revoked its pleasure to Davenport, and determined its will in his favor, so that the Crown could not be taken to be assenting to an enjoyment by him which would be wholly inconsistent with the second lease. It does not make any difference, I think, that the lease made to Baby in April, 1843, was only to hold during pleasure, for the Crown did not in fact restrain the second lessee from doing what his lease authorised him to do, and the effect upon the interests of the first lessee was the same, whether the Crown gave the right for a certain time or as long as the Crown pleased, so long as the Crown did not recall the license which authorised the disturbance of the defendant's right.

I think the rent should be recovered only up to the end of the year 1842, for it seems to be settled that there should be no apportionment of rent when there has been an eviction in the middle of a quarter.

According to this the Crown should recover, I believe under the case stated, £51 13s.

McLEAN, J.—As to the first question, it appears to me that, like other tenants or lessees, the defendant is estopped from denying the right of the Crown to grant or lease the ferry, which has been enjoyed by him since 1838, under a license which he then accepted, and subject to a

rent which he then agreed to pay. But if he were not estopped, the question as to the right of the Crown to grant a lease or license to ferry has already been decided in the several cases of *Kerby v. Forsyth*, which have come before this court, and is recognised by various statutes of the province, (a) and until these are repealed, I apprehend that a license from the Crown is not open to any question.

As to the second question, the license to defendant during pleasure was undoubtedly revoked, though probably not intended, by the granting of a license in 1843 to Mr. Baby, and from the time of such revocation the Crown could have no right to demand rent for the use of a ferry which was not enjoyed under its license. The lessee of the ferry for the time being was the only person entitled to the use of the ferry, and was bound to keep it in operation for the use and accommodation of the public. He might have prevented the defendant from running his boats at that ferry, or, if he chose to permit him to do so, might have exacted some consideration for the indulgence: but the Crown, so long as Mr. Baby's lease was in force, superseding that previously held by the defendant, could not ask the defendant for any rent or allowance for exercising a right of ferriage which he had no right to.

The third question is answered by what I have above stated; and as to the fourth, it admits of no doubt that defendant is liable, and bound to pay the yearly rent, which he undertook to pay when he received his license in 1838, up to the expiration of the year preceding its revocation. The pleasure of the Crown having been exercised in terminating the defendant's license at a period of the year when no rent for that year could be demanded, as it would only become due at the expiration of the year in June, all claim for rent for any portion of that year was abandoned. The defendant not having enjoyed the benefit of his license for the full year, could not, at the expiration of it, be called upon to pay a yearly rent, nor could he be called on to pay for a fraction of a year, his agreement being to pay by the year, and not

(a) See 37 Geo. III., ch. 10; 8 Vic., ch. 50; 9 Vic., ch. 9; 12 Vic., ch. 81.

merely up to the time that his license was revoked by the granting a lease of the ferry to another. I think the verdict should be entered for the amount of rent which became due up to 24th of June, 1842, and that for the broken part of the year, from June, 1842, to March, 1843, the defendant cannot be called upon to pay rent, which would not, had his lease continued, have been payable till June, 1843, and then only in a gross sum for the year.

BURNS, J.—Since the decision of *Kerby v. Lewis* in this court, reported in 6 O. S., 207, there can no longer be any question raised whether the Crown had the right to grant an exclusive right of ferry across the Detroit river, and therefore there is no occasion to say whether the defendant was estopped from disputing that point by reason of *Lewis Davenport* obtaining from the Crown, in 1838, a license, by way of patent, of the ferry, on condition of paying rent.

It does not appear that the limits of the ferry were defined previous to the year 1838, or that they were defined in or by the lease given to *Lewis Davenport*; and the lease to *Baby* is in the same terms, and describes the ferry as “our ferry across the river Detroit, from Windsor to Detroit. The 8 Vic., ch. 50 (1845), in the 5th section, enacts “that in any case where the limits to which the exclusive privilege of any ferry extends, are not already established, such exclusive privilege shall not hereafter be granted for any greater distance than one mile and a half on each side of the point at which the ferry is usually kept.” It does not appear that *Lewis Davenport* had an exclusive right of ferry given to him within any specified distances, though when the Crown granted to him the ferry as “our ferry across the river Detroit,” that right would, I think, be implied to embrace what was known as the ferry across the river Detroit, from Windsor to Detroit. The simple question, however, is, after having given the ferry as “our ferry,” to *Lewis Davenport* to hold during pleasure, whether the lease to *Baby* of precisely the same thing or subject matter, is not a revocation of the first. If one make an effectual grant of a thing belonging to him, he cannot make

a second grant of the same thing. Here was no effectual grant of the ferry for any certain length of time to Lewis Davenport, but only to be held during pleasure, and the rule is, where the first gift or grant is of part of the thing granted, or of part of the time only, the second grant will be good for the overplus. It is impossible to say that the grant to Baby was invalid when we see the terms upon which Lewis Davenport held the ferry, but to hold that the two are to exist together at the same time, and that Lewis Davenport should be bound to pay his £20 a-year, and that Baby should pay £37 15s. for the same thing, could scarcely be supposed to be right; for if so there would then be no limitation upon the granting of the ferry to as many different persons as the Crown chose. I do not see any difference, in applying the rule to a ferry, different from what would be applied to an acre of land, or a chattel, such as a ship, for instance, which the Crown might grant. The term, "our ferry at Windsor," must imply, when there is no reservation, the whole right of ferrying as to possession, as it would the possession of the land or the ship, as long as the grant lasted. Whether it would have been necessary for the Crown to do any thing to determine the pleasure, beyond that of granting the ferry to another person, we need not inquire into. I must take it for granted that the Crown intended that Baby should have what had formerly been given to Lewis Davenport, and that act put an end to the right of the Crown to call upon Davenport any longer to pay rent. The rent was to be payable yearly, but before the year ended, which would entitle the Crown to call upon Davenport for the rent, the lease was voluntarily put an end to. The day of payment never arrived, consequently I think it must be considered the Crown did not look for any aliquot proportion of a year.

It appeared to me the verdict should be entered in favour of the Crown for £51 13s.

Judgment for the Crown.

WOOD ET AL. V. STEPHENSON.

Check—Post dating—Days of grace—Notice of non-payment—Proof of consideration and plaintiffs' property.

A check in this country may be post-dated, though in England it is prohibited by the stamp acts.

Where such check is payable on demand, no days of grace are allowed.

Where, on the same day that the check was dishonoured, defendant paid £150 to the holder on account of it—*Seemle*, sufficient to excuse notice of non-payment, though he declared that he was then ignorant of such dishonour. In this case, however, no notice was necessary, the banker being solvent.

Held, under the circumstances set out in the evidence below, that the pleas setting up want of consideration, and denying plaintiffs' property in the check, could not be held to be proved.

Action by the plaintiffs, as bearers of an order, drawn by defendant and one Taylor, who was alleged to be out of the jurisdiction, on the 14th of March, 1857, upon the bank of British North America, for £446 8s. 9d., payable to bearer, alleging that the plaintiffs became the bearers, and that the order was duly presented for payment, and was dishonoured, of which defendant had due notice.

Defendant pleaded—1. That he did not make the order.

2. That he had not due notice of non-payment.

3. That the order was not duly presented for payment.

4. That there was no consideration for making the order, and the plaintiffs gave no consideration for the order to R. H. Brett, from whom they received it, and that the plaintiffs now hold the order without consideration.

5. That there was no consideration for making the order by defendant and Taylor, and the plaintiffs received the order after it had become due and payable.

6th. That the order was given by defendant and Taylor to R. H. Brett, who has been always the lawful holder thereof: that the plaintiffs now hold, and have always held the same as Brett's agent: that the order was given in consideration of certain bills of exchange, drawn by Brett on Messrs. Hayley & Co., in England, and since overdue and dishonoured, whereof Brett had notice, and that Brett is now liable to pay that amount on said bills of exchange to defendant: that the order (or check) sued on is now held by the plaintiffs as agents for Brett, and that Brett is liable to pay defendant as drawer of the said bill, for the amount of the said check, and defendant offers to set the same off, &c.

The plaintiff joined issue on all the pleas.

At the trial, at Toronto, before *Hagarty, J.*, it appeared that on the 4th of October, 1857, the check sued on, which was dated 10th of October, was given by defendant to Brett, who before that had failed, and made an assignment to his creditors. It was given in order to take up some bills receivable of defendant, which Brett had discounted for defendant, giving him in exchange sterling bills on Hayley & Co., in England, of a large amount, which bills matured in October and November, and were dishonoured, and returned protested.

The check was passed on the 4th of October by Brett to the plaintiffs, who had before that received from Brett the bills receivable which the check was to take up, and were then the holders of them, as having been transferred to them by Brett on account of acceptances which the plaintiffs were under on his account to a large amount, of bills drawn on them payable in New York, where the plaintiff resided.

According to the evidence, those bills receivable which Brett had received from defendant were in this manner absolutely transferred by him to the plaintiffs, to be credited if paid, but not otherwise; and they were left by the plaintiffs in Brett's hands for collection, when Brett took for them the note now sued upon.

Though the assignees of Brett at one time desired to retain the check on account of Brett's estate, contending that the plaintiffs had received from Brett more securities than they were entitled to, yet they afterwards surrendered it to the plaintiffs, as belonging to them, the estate of Brett being indebted to the plaintiffs in that amount and more, provided they paid their acceptances of Brett's bills on them which had been dishonoured, and some of which were held by parties who had claimed against Brett upon them, but had not been paid.

The check sued upon was presented at the bank on the 14th of October, and payment refused, and after such presentment, on the same day, the defendant paid to Brett on account of it £150, which was endorsed on the check.

The defendant was not proved to have had then any notice

of the check having been dishonoured, and he swore upon the trial that the check had never been presented to him till the day before this action was brought, which was on the 21st of December.

About the 14th of October the plaintiffs suspended payment in New York. Brett contended that they were in his debt, and gave notice to defendant not to pay his check to them; but about the end of October, Grant, one of the plaintiffs, came to Toronto from New York, and this check was then again put into the plaintiffs' hands to pay the balance of the account against Brett; and this was done with concurrence of Brett's assignees.

The assignees of Brett had retained the £150 paid by defendant on the check on the 14th of October, not acknowledging the plaintiffs' right to it, as the evidence shewed, and when the check was presented to the bank on the 14th of October, it was so presented on behalf of Brett's assignees as holders, for at that time they disputed the plaintiffs' right to it, and were resolved to retain it on behalf of Brett's estate, though they seemed to renounce their claim afterwards, and restored the check to the plaintiffs. That was in November or late in October, and after it was known that the bills on Hayley & Co., in England, were dishonoured, which were given by Brett in exchange for the bills receivable of defendant's customers, on account of which this check was given.

This last mentioned fact naturally gave rise to the suspicion that the transfer of the check to the plaintiffs was only a pretence, that by that means the payment of it might be forced from the defendant, when Brett or his assignees could not succeed in doing so directly, on account of the failure of the consideration for which the check was given, and of the claim which the defendant would have on Brett's estate by reason of his bills on Hayley & Co. being dishonoured.

The evidence was confined to the testimony of the defendant Stevenson, who was called by the plaintiffs, and of a brother of Brett, who seemed to have been in the employment of Brett, and afterwards of the assignees. The defendant called no witnesses.

At the conclusion of the plaintiff's case, defendants' counsel objected that the check was void, because it was post dated, being made on the 4th of October, and dated on the 10th; also, because there was no due notice of dishonour of the check given to the defendant; also, that the check was in fact a bill of exchange, having three days' grace, and should have been presented on the 17th of October, and due notice given; also, that the property in the check was in the assignees on the 4th of October, and not in Brett, and also on the 14th of October; and that when the plaintiffs took it (in December) they took it subject to all equities, and that defendant had therefore a right to set off against the check the liability of Brett as drawer of the bills on Hayley & Co., for which the check was in effect given.

Leave was reserved to move for a nonsuit; and the jury found for the plaintiffs, £307 3s. 8d.

McMichael obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, or for a new trial on the law and evidence, and for misdirection, in not ruling that there was no evidence of notice or of presentment, and that the check, being post-dated, was void; and because the evidence shewed that the check in question was not the property of the plaintiffs.

Jatterson shewed cause, and cited *Horford v. Wilson*, 1 Taunt. 12; *Wilkins v. Jadis*, 2 B. & Ad. 188.

ROBINSON, C. J., delivered the judgment of the court.

This case comes before us upon the plaintiffs' evidence; the defendant being called by the plaintiffs, gave his account of the transaction, and called no witnesses himself.

As to the objections taken at the trial, there is nothing in that which was founded on the check being post-dated. That it should not be post-dated, is only a requisition of the stamp acts in England, with which we have nothing to do.

Then as to there being no notice of dishonor given to the defendant. The bill was presented promptly, and after it was presented and dishonored, though on the same day, the defendant paid £150 on account of the check to the holder, which is indorsed upon it—a pretty good proof that the defendant was not surprised at its not being paid, or, if the

fact really was, as he declared it to be, that when he made that payment he had no notice of the dishonour of the check, it shewed that he had no assurance it would be paid. We should think it safest to infer, from the fact of his having paid it in part after it was in fact dishonoured, that he knew of the non-payment, for surely he would have thought it unaccountable otherwise that the check should be brought back to him, instead of its being taken to the bank for payment. And, besides, as to checks on bankers, given as this was in payment, the want of due presentment, or of notice to the drawer, is of no consequence, unless when the banker on whom it is drawn has become insolvent.

As to the objection, that it should not have been presented till three days' grace had expired, there are no days of grace upon a check payable on demand.

The objection that the check was given without consideration was disproved by the evidence, for it is sworn that it was given to take up customers' paper, on which no doubt the defendant was liable, and which Brett had discounted by giving sterling bills for them. The plea does not set up a failure of consideration by any thing which occurred after the order was given, but it avers that the check was given without consideration, not explaining how it came to be so given; and it is not proved that the plaintiffs gave no value for the check, but the evidence, so far as we have evidence, tends to prove the contrary, and that it was from the first held by Brett for the plaintiffs.

The plea on which the defendant chiefly relied is the sixth, but we cannot say that the evidence established the truth of that plea, for whether the testimony be true or not, it is proved that this check was taken on account of the bills receivable of the defendant, which Brett had taken from the defendant in return for the sterling bills which he had given him, and that those bills receivable were only placed in Brett's hands afterwards to be collected on account of the plaintiff; and it is sworn that, though the assignees of Brett at one time shewed a disposition to retain this check as belonging to the estate, and not as resting in Brett's hands only as agent for the plaintiffs, yet they afterwards

retired from that claim, and surrendered the check to the plaintiffs as being their property, and justly due to them upon the state of the account between Brett and them. We confess we are not satisfied that we have an honest case before us, of which we know the whole truth. There are several circumstances in it that create suspicion, one of which is the retaining by the assignees for Brett's estate of the £150 received on account of this check, the grounds on which they make a difference between that and the residue of the sum in the check not being in any way explained.

The plaintiffs, it may be, are acting in concert with the assignees, but we do not feel warranted in acting on that conjecture in face of the evidence given, and not contradicted.

Rule discharged.

IN RE CHOATE AND BLETCHER AND THE MUNICIPALITY OF THE TOWNSHIP OF HOPE.

Highway—Disposal of original allowance—By-law—20 Vic. ch. 69.

On application to quash a by-law authorizing the conveyance to certain parties of an original allowance for road, it appeared that a road intended to be in lieu of such allowance had been laid out in 1833, and constantly used since, but whether it had been legally established or not was doubtful: that conveyances had been actually executed in pursuance of the by-law, and that it had not been confirmed by any by-law of the county council, and was therefore inoperative.

The court, under these circumstances, refused to interfere.

S. Richards moved to quash by-law 114 of the Municipality of the township of Hope, passed on the 18th of November, 1857, for authorizing the town reeve of Hope to convey to certain persons, therein named, certain original allowances for road in the said township.

In the original survey of the township of Hope there was an allowance for road by the side of every second lot, leading from the front of the township on lake Ontario through the several concessions.

This road allowance between lots six and seven presented several obstacles, such as ponds, deep ravines, &c., and was in consequence not opened through the first four concessions from the front.

In July, 1821, a road was petitioned for and laid out by a surveyor, under the road act of 1810. The petition stated that the inhabitants who signed it "were desirous of having a removal of the allowance for road from between lots six and seven, and laid between lots seven and eight, in the fourth concession of Hope, and then across Nos. seven and six and a part of No. five in the fourth concession, as follows:" commencing at the fourth concession aforesaid, between seven and eight on the east side of the division line, thence northerly between said lots, 270 rods, then north-easterly to the fifth concession line of Hope aforesaid.

The surveyor laid out and reported a line in conformity with the petition, beginning in front of the *fourth* concession, between lots seven and eight, then northerly between the said lots, 270 rods; then north 45° east, till within fifteen rods of the east line of No. six in the fourth concession; then north 25° east until it intersects the allowance for road between the fourth and fifth concessions of Hope.

On the 10th of April, 1822, the trustees of the district of Newcastle, in quarter sessions, confirmed this report, there being no opposition made to it.

It appeared, according to a survey very lately made, that there was no visible trace of the original road allowance between lots six and seven ever having been opened or travelled through the north half of the *second*, the whole of the *third*, and the south four-fifths of the fourth concession.

It was fenced in and cultivated with the adjacent farms. Through about the northerly one-fifth of the fourth concession, the original road allowance between lots six and seven had long been opened and travelled, and formed a continuation to the fifth concession of the road confirmed by the quarter sessions in 1822.

From the front of the fourth concession southerly, the original road allowance between lots six and seven did not seem to be affected by anything done by the quarter sessions in 1822, or at any other time.

By the by-law complained of, passed on the 18th of November, 1857, it was recited that a line of road had been opened over the western part of the north half of lot seven

in the second concession of Hope, along and over the west side of lot seven in the third concession of said township, along and over the west side of the south part of lot No. seven in the fourth concession, in *lieu of the original allowance* for road between six and seven in the said concession, and parts of concessions, and that no compensation had been made or paid for the same: that the township surveyor had reported to the council, in writing, that the road so opened in lieu of the said original allowance was sufficient for the purposes of a public road or highway; and that the council had been required to convey the original allowances for road between lots six and seven in the north half of the second concession, the whole of such allowance in the third concession, and the south part of said original allowance for road in the fourth concession; that is to say, from the fourth concession line as far north as where the said line of road intersects the said original allowance for road between six and seven in the fourth concession of the said township, to John Rosevear, John Grieve, Asahel Hawkins, James Lang, and Andrew Jameson.

And the by-law enacted that the town reeve of Hope, John Rosevear, was thereby authorized, on behalf of the council, to execute a conveyance of the said original allowance for road to the said parties, in accordance with the statute 20 Vic., ch. 69, sec. 5.

The applicants against the by-law, Choate and Bletcher, were proprietors of parts of lot six in the second and third concessions, and they complained that the municipal council were not warranted in treating the original allowances for road in the second and third concessions as abandoned by the legal establishment of any line of road in lieu of them, for that the road laid out by the quarter sessions, in 1822, only ran northerly from the fourth concession line. And they objected further, that the council, in passing their by-law, did not observe the directions of the statute 20 Vic., ch. 69.

There were many affidavits, stating that the passing of the by-law was entirely unknown to the proprietors of lots six and seven in the second and third concessions, till the

conveyances were prepared under it: that the original allowance between lots six and seven had been many years opened on the second concession, and statute labour performed on it: and that it would be a serious inconvenience to many of the inhabitants if it should be closed up.

It was sworn by the clerk of the municipality of the township of Hope, that this by-law had not been confirmed by any by-law of the county council of Northumberland and Durham, according to the second section of 20 Vic., ch. 69, and that no notice of the by-law was published in any local newspaper, or otherwise, under the 8th section of that act: and that the municipality of Hope had made conveyances under the by-law of the original allowances mentioned in it, to the parties therein named, one of the parties being the reeve of the township, who executed the conveyance to himself of his portion.

On the other side it was shewn that, on the 9th of April, 1833, upon a petition of the inhabitants, and a surveyor's report made under the road laws then in force, a new road was laid out on the line between lots seven and eight in the second, third, and south part of the fourth concessions, in lieu of the original allowance between six and seven: that such new road being unopposed, was confirmed by the court of quarter sessions on the 10th of April, 1833, and that such road was then opened, and bridges built, and public money and statute labour expended upon it from that time.

Adam Wilson, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It may be a question whether the new road laid out in 1833 was laid out as the law directs, and whether, by what was then done, the original allowance between lots six and seven ceased to be a public highway.

The affidavits are contradictory in regard to the non-establishment by legal authority of any new line of road between the second and third concessions, in lieu of the original allowance between lots six and seven in those concessions.

The applicants against the by-law do not seem to have

been aware of the proceeding that took place in 1833, or if they were, they have avoided all allusion to it. The effect of that proceeding may be open to doubt, but it does seem that a road intended and expressed *to be in lieu* of the original allowance between lots six and seven in the second and third concessions, was surveyed in that year, and confirmed by the quarter sessions, and has been maintained and travelled constantly since.

The effect of that fact upon the public allowance, and the authority to dispose of it under any of the various acts of parliament which have been in force since, are to be considered. But, in the first place, as regards the present application, it appears that conveyances have been actually executed of the allowance for road specified in the by-law. We ought not, without necessity, to decide upon titles to real property in a summary manner, and incidentally, upon application to set aside a by-law.

There are more proper modes of trying the question whether the several alienees of the original allowances have acquired an exclusive interest in them under the by-law complained of. If they have not, the by-law can do no harm.

Then, again, it appears to us that, under the statute 20 Vic., ch. 69, sec. 2, the stopping up an original allowance for road is a distinct thing from selling and conveying it, and requires to be distinctly and directly provided for. Until a by-law has been passed, stopping up the allowances between lots six and seven, they still continue public allowances, and cannot be sold or conveyed. The authority is given to sell allowances which have been stopped up.

And, at any rate, this by-law, now complained of, if it be otherwise valid, can have no force or effect, until confirmed by a by-law of the county council, which may have passed at any time within a year from the 18th of November, 1857, the time of passing of the township by-law which is complained of.

This by-law at present has no force, and it seems premature to move against it, for if not confirmed by the county council it can affect no person's interest, and if confirmed

by a by-law of the county council, such by-law can be moved against, if it be illegal. Besides, if no notice has been given of the present by-law, as required by the 8th clause of the act, it could not be held to have legal force, and the alienees of the allowance would not be able to make title under it. I confess myself, however, at a loss to reconcile the second, fifth, and eighth clauses of the act.

Rule discharged.

ROYAL BANK OF LIVERPOOL V. WHITTEMORE ET AL.

Bills of Exchange—Damages—12 Vic., ch. 76.

Under 12 Vic., ch 76, ten per cent. damages is recoverable on all bills drawn in Upper Canada on England, and protested for non-payment.

The plaintiffs sued as drawers of the following bill of exchange.

Toronto, September 7th, 1857.

“Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of J. Henderson & Co., one thousand pounds sterling, value received, and charge the same to account of

[Signed] E. F. WHITTEMORE & Co.”

“To Messrs. ROSS, MITCHELL & Co., London.”

The declaration averred that Ross, Mitchell & Co., accepted the bill; that Henderson & Co. indorsed it to Petrie, Son & Co., who endorsed the same to the plaintiffs; that the bill was presented for payment and dishonoured, of which the defendants had notice, &c.

At the trial at Toronto, before *Richards, J.*, the defendants disputed the right of the plaintiffs to recover ten per cent. damages under the statute 12 Vic., ch. 76, and leave was given to move to strike out so much from the verdict.

S. Richards moved accordingly to reduce the verdict from £1405 1s. 2d. to £1283 7s. 10d.

Smith shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We understand the defendants' argument to be, that the right to ten per cent. damages on this protested bill does not accrue under statute 12 Vic., ch. 76, because the bill was

not "returned under protest for non-payment" within the meaning of those words as used in the first clause of that act; but we see nothing in the pleadings, or in the evidence, which can take this case out of the provision which gives ten per cent. damages upon a bill of exchange drawn in Upper Canada, as this was, and drawn upon persons in Europe.

The plaintiffs as holders of the bill are suing upon it. It was drawn upon persons resident in Europe, and was drawn in Upper Canada, and negotiated in Upper Canada, either of which facts would bring it within the clause of the act; and certainly the bill was "returned under protest."

It is alleged that the bill was not sent hence to England as a remittance by the persons suing as holders, and therefore that the inconvenience for which the damages are intended to compensate did not arise in regard to this bill; but we cannot tell, and are not authorised to enquire, to what use these plaintiffs, if they do not hold the bill otherwise than for collection, were directed or authorised to apply the money, and we see nothing in the evidence that warrants our refusal to apply the directions in the act.

We think the rule must be discharged.

ROSS V. STRATHY.

Attorney—Investigation of title—Arrears of taxes—Negligence.

Plaintiff in 1854 employed defendant, an attorney, to examine the title to certain lands, and took a deed. Afterwards it was discovered that in 1851 a portion had been sold for taxes, but when the plaintiff purchased he had still a year to redeem. In 1857 the sheriff made a deed to the purchaser, and the plaintiff then brought this action against defendant for negligence.

Held, that defendant was not liable.

This was an action against the defendant, an attorney, for negligence in the investigation of a title. The declaration stated in substance that the plaintiff had agreed to purchase certain land from one Perry, and retained the defendant to ascertain the title of said Perry, and to procure an estate in fee simple to be duly conveyed by said Perry to the plaintiff: that the defendant accepted such retainer, but disregarded his duty, and by his neglect procured the plaintiff

to pay the purchase money of the said lands to the said Perry, without obtaining a good title thereto.

Defendant pleaded: 1. Not guilty. 2. A denial of the retainer.

At the trial at Barrie, before *Hagarty, J.*, it was proved that the plaintiff employed the defendant, an attorney, to see that Perry had a good title to the land referred to in the declaration, and to prepare a conveyance from Perry to him. The defendant did accordingly make search into the title, and prepared a deed which was executed by Perry on the 10th of December, 1854.

It was discovered afterwards, that on the 31st of December, 1851, the land was in arrear for one year's taxes, and being returned to the sheriff with the usual warrant, three acres of five which the plaintiff purchased from Perry, were sold for the taxes, in December, 1852, redeemable in three years. The land not being redeemed, it was conveyed by the sheriff to the purchaser at the sale by deed made on the 18th of June, 1857. The three acres were sold for 11s. 11d., and of the three years allowed for redemption, the plaintiff had a year remaining after he took his deed, and might within that time have redeemed by paying a few shillings. The land was proved to be worth £20 an acre.

It was objected that the breach assigned in the declaration was not proved, for that a good title passed to the plaintiff in December, 1854, when he took his deed from Perry, subject to be lost, as respected the three acres, if the plaintiff omitted to redeem, before January, 1856.

It was objected, also, that no negligence was proved, for that it was not customary for conveyancers to search respecting arrears of taxes, or to inquire whether there had not been a sale of the land for taxes, not yet perfected by a sheriff's deed on account of the period for redemption not having expired.

It was proved by the treasurer that it was not unusual for conveyancers and attorneys to enquire at his office whether the taxes are in arrear on lands that are about to be purchased, but that such enquiry would only in general lead to such information respecting any taxes that were at the time

charged against the lot, and would not elicit information respecting any previous sale that had been made of the land for taxes, unless the enquiry was understood to be made with that view.

It was proved, by several respectable solicitors examined upon the trial, that it had never been usual in their practice, nor thought necessary, to search the treasurer's office for arrears of taxes, nor to enquire whether the land, or a part of it, had been sold for taxes, though yet redeemable. Of course where the land so sold had been conveyed by the sheriff, the county register would in general shew that.

The plaintiff asked for leave to amend his declaration, and the defendant's counsel thereupon withdrew his objection, that the breach as laid was not proved. And it was agreed that the jury should give a verdict for the damage which they considered had been sustained by the plaintiff losing the three acres, and it should be reserved for the court to determine whether, under the facts proved, the defendant was liable. The jury assessed the damages at £90.

D'Arcy Boulton for the plaintiff, cited *Hunter v. Caldwell*, 10 Q. B. 69; *Hayne v. Rhodes*, 8 Q. B. 342; *Cooper v. Stephenson*, 21 L. J. (Q. B.) 292.

McMichael, contra.

ROBINSON, C. J., delivered the judgment of the court.

If we are at liberty, as we infer we are, to draw such inferences from the evidence as we think the jury should have drawn, then our opinion is in favour of the defendant. We do not think it can properly be called negligence in the attorney that he did not acquire information of the fact that a portion of the land had been sold for taxes, though not conveyed. The registrar's office would have given no information, and we do not think it can fairly be considered a part of a solicitor's duty to enquire whether there are not taxes in arrear, for that is a known charge to which all occupants are liable, and against which they are in the habit of protecting themselves by enquiries made from time to time. No legal skill is required to judge of that incumbrance, and when a vendee after taking possession, is

obliged to pay an old arrear of taxes, he knows he has his remedy against the previous owner, who ought to have paid the charge.

In very many cases a professional search after that kind of incumbrance would cost more than the amount of the tax due; and it was proved that if the defendant had gone to enquire about the arrear of taxes, he would not have been likely to have been told of the sale that had gone by, since that wiped off that arrear, and it no longer stood against the land.

The plaintiff was himself wanting in diligence in allowing a year to elapse, within which he might have redeemed, and by that omission brought the injury upon himself. The concurring testimony of the respectable witnesses examined is important, we think, on the question of negligence, and should turn the scale in favour of the defendant.

The plaintiff did obtain a good title to the land, but has lost it by neglecting to redeem. There was no title outstanding when he took his conveyance, but a mere sale, which might or might not affect the title, according as the plaintiff made use or not of his privilege of redeeming, for which he had ample time.

Judgment for defendant.

REDPATH ET AL. V. KOLFAGE.

Sale of Goods—Payment by check.

Defendant bought goods from the plaintiffs, paying part in cash, and giving for the balance a bank check drawn by H. payable to bearer. Plaintiffs presented the check early next morning, but there were no funds; and at the end of a week, after repeatedly calling upon H., they demanded payment from defendant.

Held, that they could not recover, for, first, the check must be taken to have been received as cash; and secondly, the plaintiffs had at all events made it their own, by the delay in calling on defendant.

Action on common counts. *Pleas*—Never indebted, and payment.

At the trial, at Cornwall, before *Richards, J.*, it appeared that the defendants on the 12th of October, 1857, bought goods from the plaintiff to the amount of £51 2s. 2d., and having paid them on the same day or the next £36 14. 11d.

in cash, gave them on the same day a check for £13 16s. 3d., drawn by Messrs. Henderson and Holcomb, on the bank of Montreal, payable to bearer.

The plaintiffs getting this check after business hours of the bank, presented it early next morning at the bank, and were told that there were no funds. The drawers being repeatedly applied to, did not pay; and on the 20th of October the plaintiff wrote to the defendant, informing him that the check had been refused at the bank, and that they had several times called on the drawers without effect, and now demanded payment from defendant of the balance due by him. The check was not indorsed.

A verdict was taken for the defendant, subject to the opinion of the court, whether the plaintiffs were entitled to recover from defendant the amount for which the check had been given.

J. S. McDonald, Q. C., for the plaintiffs, cited Byles on Bills, Am. Ed. 84; *Geohegan v. Lawson*, 13 U. C. R. 495.

S. Richards, contra, cited Byles on Bills, 370, 229 *a*; *Camidge v. Allenby*; 6 B. & C. 373, S. C. 9 D. & R. 391; *Miller v. Race*, 1 Burr. 452; *Rogers v. Langford*, 1 Cr. & M. 637; *Turner v. Stones*, 1 D. & L. 131; *Brown v. Kewley*, 2 B. & P. 518.

ROBINSON, C. J.—We think that the plaintiffs cannot, under the circumstances, sue for the sum for which the check was given, as for so much of the price of the goods sold by them, yet unpaid to them.

In Mr. Byles' treatise on bills, in pages 123-4-5, the law upon the point involved in this case is carefully laid down, upon a review of the latest authorities; and we take it to be the result of the several cases cited by him, that the amount covered by Henderson & Co's check upon the Bank of Montreal must be considered as so much cash paid to the plaintiffs. It was accepted as cash: the check was taken at the time the goods were sold—in other words, given in exchange for the goods, as was the case in *Camidge v. Allenby*, cited by Mr. *Richards* in the argument, from 6 B. & C. 373. And it was not a check drawn by the vendee of

the goods, which if dishonoured would not have been a payment, unless the plaintiff had delayed unreasonably to present it, and the bank on which it was drawn had in the meantime failed.

This was a security of a third party, given and received, for all that appears, as cash, as is very generally the case, and will be assumed to have been the case when nothing appears to the contrary.

And, indeed, taking the case also upon the other ground on which it was rested on the argument, there is, we think, good ground to contend that the plaintiffs had at any rate made the check their own, by not having sooner given notice to the defendant that the check was dishonoured.

The plaintiffs, it is true, did present the check promptly. In that respect there was no neglect on their part. They also at once called on Henderson and Company, and endeavoured to get payment from them, which was proper. But if they ever intended to come back upon the defendant from whom they got the check, as being still liable for the amount, in consequence of its remaining unpaid, they should have lost no time in giving him notice that the check was dishonoured, and that they intended to look to him.

As we understand the evidence, the plaintiffs allowed about a week to elapse, during which they were endeavouring to get payment from Henderson & Co., before they wrote to defendant informing him what had happened. If they had written and posted the letter at once, it would not have signified that a week or more had elapsed before the defendant had received their letter, but according to all the cases I can find upon this point, the plaintiffs lost their recourse against the defendant by delaying a week or more before they took any steps to give him notice. The case of *Turner v. Stones* (1 D. & L. 128) is an authority on the point, as well as the case already cited of *Camidge v. Allenby*.

McLEAN, J.—I was at first disposed to think that the plaintiffs might recover in this action, having used due diligence in presenting the check at the bank where it was payable, and subsequently in endeavouring to recover pay-

ment from the makers ; but the plaintiffs have been guilty of such laches in delaying for so long a period to give notice to the defendant of the non-payment, that they have made the check their own, even if, under other circumstances, they could have recovered against the defendant. I incline to think, however, that having accepted the check on the credit of the drawers in payment for their goods, and having given a receipt in full of the account, they have discharged the defendant from all liability. The check was payable to bearer, not endorsed by defendant, and taken as a payment; and when defendant parted with it, and obtained a receipt for the amount of goods purchased, he had good reason to consider the account paid and discharged. The plaintiffs took the check without any guarantee by defendant, and took upon themselves the responsibility of judging of its value. Had they declined accepting it, defendant might have negotiated it elsewhere ; or he might, if refused payment at the bank, have made some arrangement with the drawers for its payment. The delay in giving notice has deprived him, it may be, of all opportunity of using any diligence for the recovery of the amount, and if the defendant received the check from any person but the drawer, such delay would render any recourse upon such person quite out of the question

The case of *Waters et al. v. Lyon, Administratrix* (15 U. C. R. 194,) shews that when a bill of exchange has been accepted in payment of an account, and such bill of exchange has been cancelled, and returned to the party by whom it was to be paid, the party cannot afterwards sue as for goods sold and delivered. And the cases of *Rogers v. Langford* (1 Cr. & M. 642), and *Turner v. Stones* (1 D. & L. 131), shew that the delay which took place in returning the check, or giving notice of its non-payment, must operate as a discharge, even if such check were not considered as a payment of so much of the account from the time it was received by the plaintiffs.

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for defendant.

HARRIS AND WOODSIDE V. THE COMMERCIAL BANK OF CANADA.

Assignment in trust for creditors—Necessity for registration—20 Vic., ch. 3—Description of the goods—Filing a copy—Goods in the customs warehouse—Change of possession.

Held, that a description of the goods assigned, as all the goods, &c., of the assignor being in and about his warehouse on Y. street, and all his furniture in and about his dwelling-house on W. street, and all bonds, bills, and securities for money, loans, stocks, notes, &c., &c., whatsoever, and wheresoever, belonging, due, or owing to him—was sufficient to satisfy the 20 Vic., ch. 3, sec. 4.

Per *Robinson*, C. J., and *McLean*, J.—That under that statute a copy of an absolute assignment or bill of sale may be filed, as well as of a mortgage. Per *Burns*, J.—That the original must be filed.

As to certain goods belonging to the assignor, but lying in the customs warehouse subject to duties, no change of possession having taken place, and no compliance being shewn with the formalities required by the customs act 10 & 11 Vic., ch. 31—*Held*, that such goods did pass by the assignment.

Per *Robinson*, C. J.—The statute requiring registration does not apply to such goods, as they are not capable of delivery, and they would therefore have passed if the directions of the customs act had been followed.

Of the household furniture mentioned in the assignment, there had been no change of possession, and the court being left to draw the same inferences as a jury would. *Held*, per *Robinson*, C. J.—That notwithstanding the registration of the assignment, such furniture did not pass. Per *Burns*, J.—That it did not pass, because the assignment was not properly registered by filing a copy only.

As to the other goods, in the warehouse of the assignor, C., who had been his clerk and book-keeper, was employed by the assignees as their agent to dispose of the stock, and collect the debts due, &c.; and he took possession accordingly, opened new books in the name of the assignees, and sold and collected the assets under their instructions, but continued in the same place, the name of the assignor remaining above the door as usual. *Held*, a sufficient change of possession within the meaning of the act.

Quære, per *Robinson*, C. J.—Whether assignments in trust for creditors are within the statute, so as to require registration; but *held* that they are.

An interpleader issue had been directed, to try the right to certain goods seized by the sheriff under an execution at the suit of the Commercial Bank v. Duncan MacDonell, which were claimed by the plaintiffs in said issue, Thomas Dennie Harris and Thomas Woodside, as assignees of the said MacDonell; and upon application and consent of the execution creditors, and the claimants, it was ordered that the facts should be stated in the form of a special case for the opinion of the court.

The following are the facts of the above special case and issue, that is to say:

On the tenth day of October, 1857, Duncan MacDonell, the

defendant in the above cause, wherein the *fi. fa.* was issued, by a deed under seal, executed and dated that day, conveyed or purported to convey to the said Harris and Woodside, among other property and effects therein mentioned, all the said property seized by the said sheriff under the said writ.

On the twelfth day of October, 1857, a true copy of the said deed, together with an affidavit of the execution of the original, and an affidavit of one of the bargainees therein, as required by the statute, were filed in the office of the county court at Toronto, where all the said property seized then was, and has ever since been.

By letter, in the following words and figures, signed by the said Harris and Woodside, and delivered by them to the person it is addressed to, on the said tenth day of October, 1857, that is to say :

“ *Toronto, 10th October, 1857.*

“MR. SAMUEL CRABBE,

“SIR—The assignees of Mr. Duncan MacDonell hereby employ you as their agent to take charge for them of the warehouses, corner of Yonge and Wellington streets, to dispose of the stock, and collect all debts due, and otherwise act under their direction.”

“Yours, &c.

“THOS. D. HARRIS,
“T. WOODSIDE.”

Samuel Crabbe, as the agent of the said assignees, took actual possession of all the goods which had belonged to Duncan MacDonell, and which were at the date of the said deed in and about his warehouses on Yonge street and Wellington street, in the city of Toronto, (including the said property seized by the said sheriff in the said warehouse,) and he has since continued, and still is in the actual possession thereof, except so far as part thereof has been sold, and except so far as the said sheriff may be supposed to have taken possession thereof by virtue of the said seizure, made on the nineteenth day of December, 1857.

The business of the said Duncan MacDonell was that of a wholesale grocer, and at the time the said Crabbe took possession as aforesaid, on the tenth day of October, 1857,

the goods in the store amounted to £2876 12s. 9d., and store fixtures and furniture £354 16s. 11d.; while the assets to be collected amounted in debts, mortgages and real estate, stock, debentures, &c., to the sum of £77,044 4s. 7d.

As such agent as aforesaid, the said Samuel Crabbe, hath since he took such possession as aforesaid, sold on credit to parties who will pay for the same, goods, being part of the above, to the amount of £467 16s. 8d., and for cash to the amount of £48 18s.

As such agent as aforesaid, the said Crabbe also took, and still has the possession of all the books and papers of the said Duncan MacDonell, and as such agent settled several accounts due to the estate of the said Duncan MacDonell, and has taken the promissory notes of the respective debtors for the same, and delivered such promissory notes to the said assignees.

As such agent as aforesaid, the said Crabbe has collected in cash of the assets of the estate, and paid into the City Bank to the credit of the said assignees, the sums contained in the pass-book kept by him with the said City Bank (*a.*)

After taking possession as aforesaid, of the said goods, books and papers, the said Samuel Crabbe did not continue the old accounts in the said books, but opened a different set of books, and has since made all his entries therein.

The said agent has not bought any new goods, but has been engaged solely in the selling of the said goods of which he took possession as aforesaid, and in settling accounts, collecting, and winding up the said estate.

The notices to the creditors provided for in the said deed were mailed in Toronto to the respective creditors, on the twenty-third day of October, 1857.

The said Samuel Crabbe was before the said assignment in the employment of the said Duncan MacDonell, in the said warehouses, as his cashier and book-keeper.

(*a*) A copy of the pass-book was annexed to the special case, which it is considered unnecessary to give here. It was headed "City Bank in account with Assignees of MacDonell & Co."

The name of the said Duncan MacDonell was not removed from above the door of the said warehouses.

The household furniture of the said Duncan MacDonell remained in his dwelling-house, without any change or alteration, in the same manner as before the said assignment, and there was no delivery thereof specially to the said assignees.

A considerable portion of the said goods, amounting to £571 4s. 8d., were at the time of the execution of the said deed in the bonded warehouse, under the custom house lock, in cellars of the said warehouse, and about one-half thereof has since been released therefrom by the assignees, by the payment of the duties on occasion of and as sales thereof have been effected by the assignees to purchasers thereof, to whom the same so sold have been delivered.

On the foregoing case the questions submitted for the judgment of the court are :

1. Whether the said deed is a valid instrument under the statute 20 Vic., ch. 3, to pass any of the property therein mentioned ?

2. Whether the goods in the customs warehouse, and the household furniture, passed by the said deed ?

3. Whether the said deed is valid, independently of the statute ?

4. Whether, by virtue of all the facts aforesaid, the said goods were properly seized by the sheriff as aforesaid, or any part thereof, was, when the said writ was placed in the hands of the said sheriff as aforesaid, the property of the said Harris and Woodside ?

The court are to be at liberty to draw any inferences from facts stated, the same as a jury.

If the court shall be of opinion in favour of the plaintiffs in the said issue, judgment is to be entered thereon for all or such portion of the said property seized as the court shall adjudge to have passed to the said plaintiffs ; and if in favour of the defendants in the said issue, then judgment shall be entered for the said defendants, for all or such portion of the said property seized as the court shall adjudge to have been liable to the said execution of the defendant.

A copy at length of the assignment, dated 18th October,

1857, under which the plaintiffs claimed, was annexed to the special case; but as the objections to its provisions, independently of the statute, were not pressed on the argument, only the description of the goods assigned is material to be given here.

It was made between the said Duncan MacDonell, of the first part, the said Thomas Dennie Harris and Thomas Woodside of the second part, and the creditors of the said Duncan MacDonell, who should execute in the manner, and within the period therein specified, of the third part; and by it the said Duncan MacDonell, after reciting his indebtedness to various creditors, his inability to pay, and his desire to have his property applied ratably to the payment of all, as thereafter provided, assigned to the said parties of the second part, upon trusts expressed for the benefit of creditors, "All and singular his stock in trade, wares, merchandise, goods, chattels, and effects whatsoever belonging to him, and now being in and about his warehouse on Yonge street, and Wellington street, in the city of Toronto.

"And all his household furniture, goods, chattels, and effects whatsoever (the personal apparel of himself and family excepted) now being in and about his dwelling-house and premises on Wellington street aforesaid.

"And all bonds, bills, and securities for money, leases for years, Provincial Insurance stock, Northern Railroad stock, mortgages, trust and all other property, personal estate and effects whatsoever and wheresoever belonging, due, or owing to him, the said party of the first part.

"And also all balances and surplus, if any, of the produce of real estate held in security by any creditor or creditors of him the said party of the first part, after satisfying such creditor or creditors of him the said party of the first part, his or their debt or debts; and all the right, title, interest, trust, possession, property, claim and demand whatsoever, at law and in equity, of him the said party of the first part, of, in, to, or out of, or upon the same goods, chattels, property and effects aforesaid, respectively, together with all books, writings, deeds, bills, notes, papers and vouchers touching the same, or any part thereof."

The provision for notice to creditors referred to in the special case was as follows:

"And it is hereby further agreed by and between the said parties hereto, that it shall be lawful for all creditors of the said party of the first part to become parties to these presents, and participate in the benefit thereof, in case they shall execute the same within ninety days after the date thereof or after notice of the making of the same shall have been delivered to them, or mailed at Toronto to their address, or last known place of above; but all creditors of the said party of the first part who shall neglect or refuse to execute the same within the said period of ninety days, shall be excluded from the benefit thereof, unless the said parties of the second part, on the request of the said party of the first part, should, after the expiration of that period, consent in writing to their becoming parties hereto, and executing the same."

The following in a copy of the affidavit of *bona fides* attached to the copy of assignment filed :

"I, Thomas Dennie Harris, of the City of Toronto, merchant, make oath and say, that I am one of the bargainees named in the original conveyance, of which the paper writing hereunto annexed purports to be a true copy. That the sale and conveyance to me and the other bargainee in the said conveyance named, of the property and effects therein mentioned, was and is *bona fide*, and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the said bargainee to hold the said property, goods and effects mentioned therein, against the creditors of the bargainor; but on the contrary thereof, for the benefit of the said creditors, as in the said conveyance expressed and contained."

A. Macdowald for the plaintiffs.

Cameron, Q. C., and C. Robinson, contra.

ROBINSON, C. J.—Upon the first question, whether the deed to these plaintiffs as trustees is a valid deed under the statute 20 Vic., ch. 3, to pass any of the property therein mentioned, I have doubts, which I believe however are not entertained by my brother judges generally, whether assignments of this description, namely, to trustees for the benefit of creditors, come within the provisions of our statute 20 Vic., ch. 3.

The imperial act, 17 & 18 Vic., ch. 36, for preventing

secret bills of sale by requiring registration, does not extend to such assignment; for though the enacting clause embraces all bills of sale "made either absolutely or conditionally, or subject or not subject to any trusts," yet in the interpretation clause (section 7) it is declared that the expression "bill of sale," as used in the act, shall not include "assignments for the benefit of the creditors of the person making or giving the same."

This at least shews that the imperial parliament did not think it necessary or expedient to include them, and it confirms the impression which I had entertained of our former statute, 13 & 14 Vic., ch. 62, and which would equally apply to the language of our present statute, 20 Vic., ch. 3, which speaks of the "*sale of goods*" as distinguished from mortgages, and speaks also of the "*bargainor and bargainee*," and the sale being "*made bona fide*, and for good consideration, as set forth in the conveyance."

It is true that in respect to real property, trusts are created by deeds of bargain and sale—I mean, by a description of conveyance technically so called—although the grantor is not selling the estate, nor the trustee buying it, and though no bargain in the common sense of the term is made between the parties; and it is true, also, that in the language of the courts all persons acquiring lands by deed or will, or otherwise than by inheritance, are said to hold as purchasers; but we have to deal here with goods and chattels, and it has not seemed to me that the legislature has used the words "*every sale of goods and chattels*" in these statutes in any other sense than their common acceptance as applied to goods: that is, when the absolute beneficial interest passes from a seller to a buyer.

A more comprehensive construction, however, has been given to them by our courts, and they are held to comprehend assignments to trustees for the benefit of creditors—like that before us.

Then assuming this deed to be one of those intended to be included, we are asked whether it is a valid deed under the statute 20 Vic., ch. 3.

Does it, in the first place, contain a sufficiently particular description of the goods, as required by the fourth clause of

the act? I cannot say that, if any one were at any time to see in another place any of the goods which at the date of this assignment were "in and about MacDonell's warehouse, in Yonge street and Wellington street," he would be able readily and easily to distinguish them from other goods, or from the goods of other parties, so as to know, by means of the description given in this deed, that the particular goods in question had been transferred by this assignment. But at the same time I confess I do not find it easy to understand how a stock of goods in a shop, or furniture in a dwelling house, are to be otherwise described than as they have been in this case, unless by taking a minute list of every article; and even that would not enable us to distinguish such articles from others of the same kind, unless there happened to be something peculiar about the thing by which it could be identified, as you might enable people to identify living animals, by age, and size, and peculiar marks.

I think we must hold that the goods in and about the particular warehouse, and the furniture, &c., in and about the dwelling house on Wellington street, are sufficiently described, so as to admit them to pass.

I do not take the fourth clause to require a particular description of bonds, bills and accounts, or of railway stocks, and things of that kind; but as to that clause in the deed which professes to assign "all other personal estate and effects whatsoever and wheresoever" belonging to the grantor, I do not consider that any goods and chattels can pass under that form of words, for otherwise we should be giving no force or meaning whatever to the fourth clause of the act.

I see nothing in the arrangements made by the deed which would warrant us in holding it void. They are such, I think, as MacDonell was then at liberty to make.

Then has the deed been registered as the act requires? It was filed within the time allowed.

We are told in the case that a copy of the deed was filed, not the original. I understand by the statements that the affidavits themselves required by the statute, not copies of them, were annexed to the copy of the deed so filed. Of course that must have been done.

The defendants object that the original assignment should have been filed, and not a copy, and that for the want of that being done the registration (so to call it) is ineffectual.

The 1st, 2nd, 5th, 8th and 9th clauses bear on this question. I have had doubts upon it, but am of opinion that a copy of an absolute assignment may be filed, as well as of a mortgage.

A reference to the former statute, 13 & 14 Vic., ch. 62, confirms me in that opinion, though certainly the act is in this respect not explicit. We must consider that the copy will give as full information of the fact of assignment, and of the contents, as the original deed would do, though the opportunity is not afforded of inspecting the signatures of the parties, which is not, however, the object of any of our registry laws.

My answer, therefore, as to the first question put to us in the case, is, that the assignment is in my opinion valid, so far as a compliance with the statute is concerned. (Beaumont on Bills of Sale, 106.)

The second question is, whether we think the goods in the customs warehouse, and the household furniture, passed by the deed.

In my opinion the goods in the customs warehouse did not pass by the assignment, if that assignment, under the circumstances, required to be filed in order to pass the property, for these goods were not in any manner particularly described in the deed, either by locality or otherwise, so that they could not pass unless under the words, "and all other personal estate whatsoever and wheresoever belonging to me," &c.

But I consider the effect of the fourth clause of the statute to be, that when the goods, by reason of there having been no change of possession, must be deemed to have been fraudulently assigned, unless it was done by a written assignment registered according to the act, then such written assignment, to be effectual, must describe the goods in such a manner as will be sufficient under that clause.

Now these goods being in the custom house, and not in the actual possession of MacDonell when he made the assign-

ment, the question is, whether they are within the operation of the act.

I think they are not, for they were not in the actual visible possession of MacDonell, capable of delivery over by him at the time, nor were they held by any servant or agent of his for his benefit, so that the public could draw any inference from their observation of circumstances that they were still in his possession after the date of the assignment as well as before, and so might be left to conclude that they remained the property of MacDonell. He could not gain possession himself until he had paid the duty, and so could not at the time have delivered possession to the assignees. But then we have to consider that by the statute 10 and 11 Vic., ch. 31, sec. 28, MacDonell could not assign them to the plaintiffs, so as to pass the property, without going through the formalities required by that statute, of which we see no evidence. Subject to this last mentioned difficulty, however, I think that, for the reason I have given, the assignment was not within the act as regards those goods, and that they have passed as they would have passed before the statute, if the customs regulations have been complied with, otherwise not. (a)

Then as to the household furniture, if I am right in the opinion that a more particular description than is given of it in the deed was not necessary, as to which I confess I have had difficulty in making up my mind, then the only reason why it should not be taken to have passed is, that MacDonell remained undisturbed in the possession of it as if he had never assigned it.

I do not think that the registration of the assignment secures the transaction against the inferences that might otherwise be drawn from the fact of the possession remaining unchanged. If the case had gone to a jury, they must have been asked to pronounce whether from this circumstance they did or did not take the assignment, so far as it concerned the household furniture, to be merely colourable and pretended. And as it is referred to us to draw such inferences as we think a jury should have drawn, I must say that I think the household furniture did not pass by the assignment, for the

(a) See *Baldwin v. Benjamin*, ante, page 52.

continued possession by MacDonell is in no manner accounted for; and this being so, I think the inference arises that it was included in the assignment in order to prevent its being taken in execution, and to protect the convenience of Mr. MacDonell.

As the execution in this case came but a few days after the assignment was made, I should readily have given way to any reasonable explanation of the furniture not being removed, but without anything to indicate an intention to change the possession, I consider that we ought, as to that, to regard the assignment as colourable and pretended, and not *bona fide*, but only to be made use of, if necessary, for the protection of the debtor's possession of it.

3rdly. I think the deed as a deed is valid, independent of any question under the statute. I mean that there is nothing in the contents of the deed which should lead us to declare it void for fraud or otherwise.

4thly. We are asked to say whether, considering all the facts stated, all the property seized under the defendants' *fi. fa.* was, at the time of the writ going to the sheriff, the property of the plaintiffs, the assignees.

In my opinion it was all their property, except the household furniture and the goods in the warehouse, for the particular reason given, unless the provisions of the customs act were complied with. I think, under the facts stated, there was a sufficient taking of possession, and dealing with the goods under the assignment, to free the assignment from suspicion on the ground of fraud. The not removing them to other premises is accounted for by the fact that there was no sale to the assignees for their own use and benefit, as in a common case between buyer and seller.

It was in the natural and usual course of things that the trustees should not remove the goods to other premises. And I think the allowing Mr. Crabbe, who had been clerk or bookkeeper to MacDonell, to continue on the premises in their service, should not of itself lead us to treat the assignment as otherwise than *bona fide*, having been made for the purpose for which I have no doubt it was made: that is, to enable the assignees to sell the goods for the benefit of the

creditors, and according to the trusts in the instrument, for which purpose his services may have been particularly useful to all concerned.

BURNS, J.—The first point to be determined, as it appears to me, is whether a deed conveying a person's goods and chattels upon trust for the benefit of creditors, is such a sale and conveyance thereof, that when there has not been an immediate delivery and continued change of possession, the deed must be registered under the statute 20 Vic., ch. 3. On this point I have little more to add to what I said in *Heward v. Mitchell* (11 U. C. R. 625). I look upon such deed of transfer to be as much a sale upon the consideration expressed as if it had been a money consideration paid to the bargainor. The consideration is to pay his debts with the proceeds, which surely is as good, and as much a sale, as if the bargainor had sold for money paid or to be paid to himself. The difficulty pressed upon the court in *Heward v. Mitchell* was that the affidavit required to be made by the bargainee should set forth the consideration for the conveyance, and that, as the affidavit in that case stated the conveyance to be made for the benefit of creditors, it was not such a sale as contemplated by the act 13 & 14 Vic., ch. 62. I thought then, and think still, that an affidavit might be made in that form, inasmuch as I considered a transfer of property to pay debts a sale of it for that purpose. The recent statute passed since that decision has altered the form of the affidavit, by making it refer to the deed for the consideration instead of setting forth the consideration in the affidavit. Now the affidavit may state that the sale is *bona fide* and for good consideration, as set forth in the said conveyance—apparently intended to meet cases different from a mere sale for a sum of money paid or secured to be paid as the consideration. It is necessary to determine this question, for the purpose, at all events, of deciding with respect to the household furniture of the assignor, which it is admitted the plaintiffs never did take or have any delivery or possession of other than constructively under the conveyance.

If the conveyance required registration, the next question is, whether registering a copy with the affidavit of the bargainee attached to the copy, is a compliance with the statute 20 Vic., ch. 3, secs. 2 and 5. I am of opinion that it is no compliance with the act. The former statute 12 Vic., ch. 74, expressly provided for a copy of the mortgage, in cases of mortgages, being registered in lieu of the original deed, and in case of a copy being filed, it was provided that the affidavit of the execution to be attached to the copy, should state the due execution of the original, of which the copy to be filed purports to be a copy. The next statute 13 & 14 Vic., ch. 62, putting sales, where not accompanied by an immediate delivery and continued change of possession, upon the same footing with mortgages as to registration, says nothing about a copy of the instrument of sale being registered, but that statute enacts that what is there enacted shall be added to the first section of 12 Vic., ch. 74. Whether that would have been held to authorize the registration of the copy of an instrument of sale, as well as the copy of the mortgage, I am not prepared to say. The question never was agitated that I know of under those acts, and as they have been repealed, it is not necessary to consider what might have been thought about it. The new act, as I read it, clearly draws a distinction between mortgages and sales. Sections 3, 7, and 8, relate exclusively to mortgages, and it is provided again with respect to them that a copy may be filed instead of the original instrument, and the affidavit to be attached to such copy shall state the due execution of the original of which the annexed copy purports to be a copy. The second section applies exclusively to sales, and it enacts that the conveyance shall be accompanied by an affidavit of a witness of the due execution thereof, and an affidavit of the bargainee that the sale is *bona fide*, and shall be registered as thereafter provided. Not a word is said about registering a copy, or any such provision with regard to the affidavit of execution, as in the case of mortgages. Then the fifth section enacts that the instruments mentioned in the preceding sections shall be registered in the office of the clerk of the county court, and that must of course refer to the mortgages

and copies thereof mentioned in the first section, the conveyances of sale mentioned in the second section, and the mortgages of a particular description mentioned in the third section. Whatever may have been the reason for making a distinction between mortgages and sales, it is apparent to me that it exists, and that a conveyance of sale of the goods must be registered, and not merely a copy. The affidavit of the execution filed in this instance is that of execution of the original, of which the copy annexed purports to be a copy. This is no compliance with the provisions of the second section of the act, unless that section is to have incorporated with it the provisions of the first section relating to a different subject altogether. No warrant exists for such a construction. In my opinion the provisions of the two sections are distinct, and each complete in itself without reference to the other, and if the legislature had contemplated that a copy of the conveyance of sale might be registered, instead of the original deed, the section might either have referred to the other, or have re-enacted the same provision with respect to the affidavit of execution.

It is very true the second section does say that the conveyance of sale shall be in writing, and shall be a conveyance under the provisions of the act, but then that applies to the deed itself, what *it* shall be, and not to any copy, and cannot incorporate with it the idea that registration is also part of the conveyance.

It must be assumed, therefore, as I take it, that it was intended that notice to the public, by means of registration, of the two dispositions of property, should be different, without our endeavouring to find satisfactory or sufficient reasons for it.

This, so far, then, disposes of the household furniture. The defendants are entitled to have that made available to their execution.

The next question is, whether there was an immediate delivery and continued change of possession, which would enable these plaintiffs to hold the goods and merchandize in the warehouse of the assignor, and in the bonded warehouse, as against an execution issued in favour of one creditor of the assignor. The parties have submitted the case to the

court without the intervention of a jury to decide the fact, and of course it gives the court no little embarrassment in determining the matter, for we are not only called upon to say whether there be any evidence to go to a jury whether there was an immediate delivery, and also a continued change of possession, but in fact whether the evidence (if there be any) is sufficient to convince the mind of the truth of an immediate delivery and of a continued change of possession. I take the following proposition to be indisputable in cases like the present: namely, that when it is once established that a person has been the owner of goods, and has continued in possession until some time ascertained, the presumption is that he continued in possession as owner; and if there has been any change of ownership before that time, it is incumbent upon him who asserts it to establish the change beyond all question, when it is to bind the rights of those who act upon the presumption of ownership continuing. The first question will then be, whether this case, as admitted by the parties, presents any evidence which a judge should submit to a jury to pronounce whether there was an immediate delivery of the property, and a continued change of possession. Until the 10th of October, 1857, Duncan MacDonell not only was the legal owner, but was also in actual possession of the whole property in his warehouse, and, so far as permitted by the customs, of that portion which was under lock and key of the customs, the goods being bonded. On that day he assigned the goods to the plaintiffs, and they gave a letter to one Crabbe, formerly the book-keeper of MacDonell, to take possession for them. On the 14th of October the defendant's execution was placed in the hands of the sheriff. It appears to me, with respect to the goods in the bonded warehouse, there was not and could not be a change of possession on that state of facts. The possession of the goods in the warehouses of MacDonell by Crabbe, admitting that he had an actual possession of those, did not carry with it or draw to that possession the possession of the goods under bond, any more than that of the household furniture. The 12th section of the statute 10 & 11 Vic., ch. 31, provides for the owners of goods bonding them, and paying duties when the goods are taken out of the

warehouse for exportation or consumption. In the meantime, though the owner is the legal proprietor of the goods, yet the actual custody is in the customs authorities. Section 28 shews what is necessary to be done in order to complete a transfer upon a sale of goods in bond, in order to give title to the vendor. In this case it does not appear that any thing required by that section was done, but they have treated the matter as though the actual possession of the goods not in bond would draw to it the possession of those that were in bond. Admitting that the legal effect of the deed of transfer, with possession of part, would draw to it a possession of those in bond for the purposes of the trust, if the statute 20 Vic., ch 3, were out of the way, it could be only on the ground of constructive possession. I believe we have always treated the doctrine of constructive possession under the chattel mortgage and sales acts, whenever the rights of creditors are affected, as entirely abrogated. If the provisions of the 28th section of 10 & 11 Vic., ch. 31, had been observed in this case, then indeed it might have been contended that a complete change of possession, as well as change of property, had taken place, so as to prevent an execution reaching the property; but without that, it does not appear to me there is any room for holding that an immediate delivery had taken place. There could be no delivery in point of fact to be actual so long as the goods remained in bond, without the 28th section being complied with, and therefore, as respects those goods, I think they were liable to the execution, subject to the sheriff, or the creditors who set him in motion, paying the duties on the goods in bond.

With respect to the residue of the goods, it appears to me there was evidence to be submitted to a jury to say whether the plaintiffs were in possession. I do not look upon the circumstance of the name of the assignor not being removed from above the door of the warehouse after the assignment or transfer was made, or the fact that the person put in possession by the assignees had been previously a clerk of the assignor, as of themselves furnishing evidence that in truth no transfer binding in law or equity had taken place. Such things, combined with other matters, may in

some cases he considered as affording proof that an assignment has not honestly been made, but in the abstract would not of themselves be assumed to afford evidence of a dishonest purpose. No doubt the intention of the assignor was that any execution coming against him after the 10th of October should be prevented from touching the goods; and for the purpose of having the property applied to the payment of debts the transfer was made to the plaintiffs, and they employed as their clerk a person who had formerly been in the employment of the assignor, and put him in possession for them, and he opened new books, and an account at a bank, in the names of the plaintiffs. It does not appear that the assignor, after that period, ever entered the warehouse, or had the slightest thing whatever to do with the goods or the warehouse, but the sales of goods made afterwards were made by the clerk placed in charge by the plaintiffs, and on behalf of the plaintiffs.

It appears to me, therefore, that judgment should be given for the plaintiffs for the goods in the warehouse, and judgment for the defendants for the household furniture in the dwelling house in Wellington-street, and for the goods in the bonded warehouse.

McLEAN, J., concurred, agreeing in opinion with the Chief Justice, that registration of a copy of the assignment was sufficient.

Judgment accordingly.

READ ET AL. V. SCOVILL AND WILSON.

Bail—Recognizance—Render—Delay.

The bail, before action brought on the recognizance, took the debtor to an office some distance from the court house, where the deputy-sheriff was in the habit of transacting business with praicioners, and there tendered him in their discharge. The deputy referred them to the sheriff's office as the proper place, where they went, but found only a clerk, who had no authority to act in such matters. They then went to the gaol, and tendered him to the gaoler's wife, the gaoler being absent, but she refused to receive him. Afterwards the plaintiffs sued on the recognizance. Defendants applied without success in Chambers to stay proceedings, and at the end of three months rendered the principal.

A verdict having been found for the plaintiffs—*Held*, that the court could not interfere.

Action on a recognizance of bail, entered into by defen-

dants on the 17th of March, 1857, conditioned that Philo L. Scovill should render himself or satisfy the costs and condemnation money in a suit of these plaintiffs against him, setting forth that the plaintiffs, on the 8th of July, 1857, recovered judgment for £302 15s. 3d., and that Philo L. Scovill did not render himself to the custody of the sheriff of Hastings, or pay the said damages, according to the conditions of the recognizance.

The defendant Byron Scovill pleaded that Philo L. Scovill was duly rendered to the custody of the sheriff of the county of Hastings in the plaintiffs' suit, on the 1st of December, 1857, and before the commencement of this suit, according to the condition of the recognizance.

The defendant Wilson pleaded, that no *ca. sa.* against Philo L. Scovill was duly issued and returned before this action was brought.

The principal was rendered to gaol at the suit of these plaintiffs on the *ca. sa.* on the 12th of March, 1858, and the sheriff's certificate to that effect was produced on the trial of this cause against the bail, which took place on the same day, at Belleville, before *Draper, C. J.*

The defendants, in support of their plea, gave evidence that before process was sued out in this case, but four or five days after the *ca. sa.* against Scovill had been returned *non est inventus*, Wilson, one of the bail, took Scovill, an attorney being with him, to an office in the town of Belleville, some distance from the court house, where the deputy sheriff was in the habit of attending to transact business for the convenience of practitioners in the town, the sheriff's office being in the court house, and there tendered Scovill to the deputy sheriff in discharge of his bail, the plaintiffs' attorney in the suit against Scovill being also present. The deputy-sheriff declined to receive him, saying that was not the place to bring the debtor to in order to receive him, and referred them to the sheriff's office in the court house as the proper place. The parties who wished to surrender Scovill had no document or paper with them. They found at the sheriff's office a clerk or bookkeeper of the sheriff only, who told them that he had no authority to transact such business, and could do

nothing in it. The debtor was then taken by the bail (Wilson) to the gaol, and tendered to the gaoler's wife, the gaoler being absent. She refused to receive him. After this, on the same day, or the next, this action was brought against the bail, whereupon the attorney for the bail gave notice that he would move to set aside the proceedings. No attempt was made to render the principal from that time to the day when he was actually rendered on the 12th of March last. The jury found for the plaintiffs £302 15s. 3d.

An application had been made to the learned Chief Justice of this court in Chambers, before the assizes, to stay proceedings, on the ground that by what took place in December the principal had been legally surrendered by his bail. It did not appear to the learned Chief Justice that it could possibly be held that the principal was rendered on that occasion, and he declined to stay the proceedings, but allowed the action to go on against the bail, intimating that if upon what might be proved upon the trial it should appear to this court that a legal render had taken place, there would be no hesitation in staying proceedings even after verdict.

O'Hare obtained a rule to shew cause why there should not be a new trial, on the ground that a legal tender of the principal had been made to the sheriff, his deputy and gaoler, sufficient to discharge these defendants, before the commencement of this suit; or why this suit should not be stayed, and all further proceedings against these defendants, on such terms as the court might think fit, on grounds appearing at the trial, and on affidavits filed, the principal, Philo L. Scovill, being now in the custody of the sheriff of the county of Hastings, rendered in discharge of his bail—with leave to defendants to use the affidavits filed on the application made in Chambers.

Henderson shewed cause, and cited 2 Geo. IV., ch. 1, sec. 12; 4 Wm. IV., ch. 5; *Bird v. Atkins*, 7 Dowl. 769.

O'Hare, contra, cited *Wright v. Tucker*, 6 U. C. R. 24; *Cochrane v. Eyre*, Ib. 594; *Manning v. Proctor*, 7 U.C.R. 22.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the defendants cannot be held to

have been entitled to succeed upon either of the pleas. It was shewn that a *ca. sa.* in the original action was regularly taken out and returned, after having been the proper time in the sheriff's office. As to what took place in December, it cannot for a moment be contended that it amounted to a render, and it is to be regretted, on account of the bail, that when it was obvious the plaintiffs were not disposed to waive any formality, the necessary steps had not been taken for making an effectual render, by placing the debtor properly in the sheriff's custody in the gaol, and giving notice to the plaintiffs. It would have occasioned much less trouble and expense than the attempt to have the ineffectual render recognized as sufficient. Instead of that the action has been allowed to go on against the bail, without any thing more having been done from December to the assizes in March. We cannot, after all this delay, stay proceedings on account of the render made in March, more than three months after the action was commenced against the bail. It does not seem that this would at any time have been consistent with the practice of the court, where there was nothing to account satisfactorily for the delay. Our 83th rule now imposes a stricter practice even than formerly in this respect, for the court of Queen's Bench in England has held, in the case of *Bird v. Atkins* (7 Dowl. 769) that the rule of court of which ours is a transcript, does not leave a discretion in the court to relieve after the time mentioned in the rule, which in England is eleven days, and in this country eight, after the service of process in the action against the bail. We must therefore discharge this rule. The debtor it seems is now in custody as rendered by his bail, but whatever it may be proper to do in so far as he is concerned, in consequence of a recovery against the bail, his render can be no reason why the plaintiffs should lose their remedy against the bail, if they are fixed by reason of not having rendered him in time.

Rule discharged.

BURGESS V. DENISON.

Lease—Defective description—Latent ambiguity—Parol evidence.

Defendant leased to plaintiff a lot of land, “ known as the Park, in front of Denison Terrace residence, and to embrace all the land from the carriage drive in front of the house to Dundas street on the south, *to be bounded on the east by the garden fence of my old cottage*, and on the west by McGregor’s garden and my orchard, and to embrace all the flats even with the north part of the cottage now occupied by my carpenter, and which cottage is to go in the bargain with the land.” It appeared that the garden fence extended only part of the way to the drive from Dundas street, and the dispute was as to the eastern boundary beyond it.

Held, the plaintiff was not therefore entitled to claim to the eastern boundary of all the land known as the park, but that this being a latent ambiguity, parol evidence was admissible to ascertain what was intended by the parties.

TRESPASS, to part of lots Nos. 25 and 26, being the park in front of Denison Terrace residence, and embracing all the land from the carriage drive in front of the house to Dundas street on the south, to be bounded on the east by the garden fence of the old cottage of the defendant, and on the west by the garden of one McGregor, and the orchard of the defendant, and embracing all the flats even with the north part of the cottage occupied by one John Keeler.

Plea.—That the land was not the plaintiff’s.

At the trial, before *Burns, J.*, at Toronto, the facts appeared as follows : The plaintiff became tenant of the defendant, by a lease dated 24th January, 1855, for seven years, from the 1st of April, 1855, of two certain parcels of the lots mentioned in the declaration, paying for the first two years £3 10s. per acre, for the next two years £4 10s. per acre, and for the last three years, £5 10s. per acre. The two pieces of land which the plaintiff was to have were a field in front of defendant’s house, and lying south of it, and a garden and land called flats, with the cottage then occupied by Keeler. They were thus described in the lease : “ That certain lot of land, being part of park lots Nos. 25 and 26, and known as the park in front of Denison Terrace residence, and to embrace all the land from the carriage drive in front of the house to Dundas street on the south, *to be bounded on the east by the garden fence of my old cottage*, and on the west by McGregor’s garden and my orchard, and to embrace all the flats even with the north part of the cottage now occupied by

John Keeler, my carpenter, and which cottage is to go in the bargain with the land." After the lease was executed, Mr. Unwin, the surveyor, was called upon to measure the land, and he did so in presence of the plaintiff, and the quantity was found to be very nearly twelve acres, and on the 10th of April, 1855, the defendant made a memorandum at the foot of the lease, in these words: "Mr. C. Unwin measured the ground herein mentioned, and it was found to contain twelve acres, after deducting for space occupied by trees." The lease contained a covenant by the plaintiff to protect from injury all young trees then growing on the land. At the time the lease was executed the defendant used a drive in front of his house to the west, into a road called Dover court road, and so into Dundas street. This drive extended from the defendant's house to the cottage occupied by Keeler, and afterwards by the plaintiff, and which was to the east of defendant's house. This drive formed the northern boundary of the land leased, about which there was no dispute. The flats spoken of, and land with Keeler's cottage, was at the time the lease was made under fence, separated from the other land mentioned. There was no difference between the parties respecting the southern or western boundaries, or the eastern boundary, so far as affected by the garden fence of the defendant's old cottage, but the dispute was as to the boundary from the end of the garden fence, which extended only about half the distance from Dundas street to the carriage drive on the north. The flats mentioned extended to the east of the cottage, and south of it, and, as already mentioned, were under fence at the time. South of the flats was a piece of high ground covered with small trees and bushes, and this piece of ground was to the east of the line if protracted from the garden fence northwards. During 1856 and last year the defendant had improved an old road, which was used before leasing to the plaintiff, from the easterly boundary of the defendant's land through the last mentioned piece of wood or shrubby land, to connect with the east end of the carriage drive, a little west of the plaintiff's cottage; and in 1856 he fenced in the drive or road so improved, and made side

gates for the plaintiff near his cottage, so that he could cross to the field spoken of, and also used the road. It was for doing this that the action of trespass had been brought; and the plaintiff contended that from the point of the old garden fence spoken of there was nothing to limit the eastern boundary, and that he had a right to go as far east as the defendant's land extended: that is, to call the whole of it the park; and that no land was reserved between the field spoken of and the land transferred with Keeler's cottage:—in point of fact, that the whole quantity formed one description and one piece of land, and not two. On the other hand, the defendant contended, that before the lease was made there was a road from the old cottage along the garden fence on the eastern boundary of his own land, extending through the wooded piece of land spoken of to and joining with the carriage drive spoken of, and that it joined the drive just a little west of the fence of the land with Keeler's cottage, thus separating the lands leased to the plaintiff into two separate portions, and giving the defendant an entrance to his house from Dundas street, both on the west and on the east.

The learned judge considered the description of the eastern boundary of the land, as mentioned in the lease, so ambiguous that it was impossible to construe or understand it, and he received parol evidence of the situation of the property before the lease was made, and of the acts of the parties at the time of making the lease and since. It appeared that before the lease made to the plaintiff, for several years, and while the defendant was building his new house, a road existed from the garden fence through the higher ground west of the flats, going northwards and joining the road running west from Keeler's cottage. The defendant used this road for carrying materials for building his house and other purposes. At the time of the measurement of the land by Mr. Unwin, in order to ascertain the number of acres to fix the rent, the plaintiff went with him and examined the boundary of the larger or western piece, and they traced and measured from the old garden to the west along Dundas street, thence to the carriage drive on the north, and then following that drive eastward until the parties came to the point near

Keeler's cottage. Mr. Unwin stated that they did not take in the road, which then existed upon the ground, but stopped there, and extended from that point down in order to join the old garden fence; and at that time, he said the land and flats with Keeler's cottage were under fence, and distinct from the other. When the defendant was building the fence to enclose the road the plaintiff complained of his encroaching upon him to the north, and defendant moved the posts of the fence to correspond with Mr. Unwin's line, but the plaintiff made no complaint of what the defendant was doing from the northern boundary eastward to the old garden fence until just before the bringing of this action, in which the writ was sued out on the 15th of December, 1857. While the defendant was improving the road, by cutting down the high places and filling up the hollows, the plaintiff directed his workmen to put some stumps he was grubbing out of the land he had into the hollows, observing that they would help to fill up the places for the road, and in fact the plaintiff wanted to obtain the job of making the road complete, offering to do it for £90. The defendant placed gates in both fences, for the plaintiff to cross from his cottage to the other field, so that he might cross the road, and the road was open for his use as well as that of the defendant.

Under these facts the learned judge construed the lease in this manner: namely, that the land in front of Denison Terrace residence meant all the land from the carriage drive in front of the house—that is, the carriage drive to Dundas street, whether east or west,—and that consequently the carriage drive was the eastern boundary of that piece of land until it reached the old garden fence; and he told the jury that the weight of evidence in his opinion favoured that view; and that, if so, it was not proved that the defendant had committed any trespass on the plaintiff.

The plaintiff's counsel objected to the charge, and contended that it was the land extending to Dundas street that was meant, and not the carriage drive to Dundas street, and consequently there was nothing to govern the eastern boundary from the old garden fence, but that the plaintiff's right

to the east extended to the boundary of the defendant's land, or at least to what might be said to be the park, and that the witnesses spoke of the whole quantity of land as being the park.

The jury found for the plaintiff, and £37 10s. damages.

Adam Wilson, Q. C., obtained a rule to shew cause why the verdict should not be set aside, as being contrary to law and evidence, and the judge's charge, and on the ground of excessive damages.—He cited *Dyne v. Nutley*, 14 C. B. 122.

Eccles, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

As the plaintiff, according to the evidence, seems to have first conceived the idea of claiming the land which he now contends for after he had been long in possession, there is much reason to infer that he is not setting up a very reasonable claim, but that he is rather contending for something which he supposes the want of exactness in the description may give him a chance of obtaining, than that for which he understood and believed he had got when he took the lease.

The description is unfortunately very loose. If it were so indefinite as to be unintelligible, and altogether uncertain, then the plaintiff would take nothing under the lease, for it would on that account be void. If we could see from the description that it was intended to lease to the plaintiff all the land south of and within the carriage drive down to Dundas street, then the case would be plain, but the plaintiff would not by that construction gain what he is contending for. It is clear, however, that we cannot so read the lease as to make it extend east and west to the carriage drive, all the way to Dundas street, because there are limits spoken of on the west and east which are within the carriage drive and would be inconsistent with such a construction. It is plain that the carriage drive is referred to only as explaining that no land is leased north of that, but only to the south, and from the drive to Dundas street. On the west side a limit is expressed, about which there is no dispute, but on the east, though a limit was intended to be expressed, it is not clearly laid down. "To be bounded on the east by the garden

fence of my old cottage," would have been sufficiently explicit, if the garden fence had continued north up to the carriage drive, and as any stranger knowing nothing of the ground and looking only at the lease would expect to find it did. Now when we learn from the evidence that the garden fence did not so extend, a latent ambiguity is for the first time disclosed by this extrinsic evidence, and we may therefore and must resort to extrinsic evidence to ascertain what was intended; and when the evidence is attended to, it is very plain what was meant to be leased from what was proved on the trial respecting the survey made for the purpose of fixing the rent, and to which the plaintiff was privy, and respecting the conduct of the plaintiff after he took possession.

How otherwise are we to solve the doubt which arises when we are told that the garden fence of the old farm only extends a little way north from Dundas street, and cannot therefore form a perfect limit to the east as the lease would lead us to suppose? Shall we adopt, as has been suggested in argument, the limit which would be marked down by protracting the line of the garden fence in the same direction northerly till it reaches the carriage drive? That would not answer the purpose of the plaintiff, for it would confine him within narrower bounds than have been conceded to him by the defendant. We see no other legal or reasonable course but to resort to the evidence that was given of what both parties understood to be the land leased at the time the plaintiff took possession, and for which the plaintiff has been paying rent as estimated by the acre.

Unless, indeed, we could say that the remaining words of the description given in the lease supply what is wanting in regard to the eastern boundary—I mean the words, "and to include all the flats even with the north part of the cottage now occupied by John Keeler, and which cottage is to go in the bargain with the land"—one would expect to find on the ground that the eastern boundary, as governed by the garden fence of the old cottage, would take in the flats and Keeler's cottage, but it is plain from the plans that this is not so. Under that part of the description nothing but

flats and the cottage spoken of, we think, can be held to pass by the lease, and not the upland which the plaintiff is now claiming. The construction placed on the description by the learned judge on the trial was not an unreasonable one; namely, that the carriage drive was to be the eastern boundary till the garden fence of the old cottage was reached. But we do not see by what allowable construction the verdict is supported, and we think there should be a new trial, without costs, for that we have no course left but to be governed by what it was proved the parties themselves meant and understood at the time.

Rule absolute.

HUMPHRIES V. BARNETT.

Dower—Damages—Demand—13 & 14 Vic., ch. 58.

Dower—Plea *tout temps prist*. There was no averment that the husband died seized, and no damages were claimed, but the jury found for the plaintiff, and 1s. damages. *Held*, that the damages must be struck out. Where nothing appears on the record to shew that a demand of dower was served, *semble*, that the master cannot tax costs—and *quære* as to the proper mode of shewing that a service of demand was “made appear on the trial” so as to entitle demandant to costs under 13 & 14 Vic., ch. 58, sec. 5.

Action for dower claimed by demandant, Emma Humphries, as widow of Samuel Humphries, in a village lot in the village of Percy. There was do averment that the husband died seized, and no damages claimed for the detention of dower.

Plea, *Tout temps prist*, and issue thereon.

At the trial, at Cobourg, before *Draper*, C. J., it appeared that the demandant, on the 5th of July, 1856, had a written notice served upon the tenant, according to the statute, demanding her dower in and to certain lands in the village of Percy, &c., and now occupied by ———.

It was proved that two or three days after service of the demand, the tenant said to the agent of the demandant that she might come and receive her dower. This was said on the premises, which consisted of a quarter of an acre of land with a dwelling-house on it and a tannery, and the tenant took the agent up stairs and offered him a third of the house

The demandant was not present. No dower was in fact assigned.

It was objected that no sufficient demand of dower under the statute was served, the lot not being designated, and the name of the occupant not being stated.

The learned Chief Justice thought that, as the tenant had appeared and pleaded that he had tendered dower, he must be supposed to know out of what property the dower was claimed, and that it did not signify whether the name of the occupant of the lot was specified in the notice or not.

A verdict was given for the plaintiff, with one shilling damages.

Wallbridge, Q.C., for the tenant, moved for a new trial, contending that the evidence shewed that the tenant always had been ready and willing to render dower, and objecting to the improper reception of evidence respecting an alleged demand of dower; or that the damages given should be struck out of the verdict, the same having been improperly assessed, no demand having been made, and the demandant's husband not having died seized; or that a suggestion should be allowed to be entered on the record for depriving the demandant of costs.

C. S. Patterson shewed cause.

ROBINSON, C. J.—I think it is immaterial to the tenant whether the one shilling damages is or is not allowed to stand, for that the effect of the statute 13 & 14 Vic., ch. 58, sec. 5, is to give or withhold costs, according as the proof may be of a demand of dower having been served as required by that act, and according as it may or may not appear that the tenant offered to assign dower before action brought, and this without regard to whether damages were recovered or not; but as this may admit of doubt, and as I think the plaintiff in this case had no right even to nominal damages when the husband was not alleged to have died seized, and when no damages could legally be claimed, or were in fact claimed, and no entry of *venire facias* to assess damages appears on the record, I am of opinion that we should make absolute the rule *nisi* so far as regards the striking out the entry of one shilling damages.

There will remain the question, whether the demandant should be allowed costs or not, and that depends on the clause of the statute which I have already referred to.

There is an absence of any thing upon the record to shew that dower had been demanded, and proof of that given at the trial, and I think that is indispensable, as well when the tenant pleads *tout temps prist* as in other cases, for though he says he has always been ready to assign dower, he is not on that account the less entitled to have the demand directed by the statute served upon him a month before action brought, since that gives him intimation 'that an action is intended, and he is entitled to the opportunity, which that information would give him, of going and offering to assign dower within the month, and thereby saving himself costs by preventing the necessity for an action.

As this case stands, we should do no more, I think, than strike out the one shilling damages, for the reason I have stated, namely, that on this record damages are not claimable, and were not claimed; and then it will be for the parties to go before the master for taxation, and having nothing to shew him that it was proved on the trial that a demand was made on the tenant according to the statute, he will, as I assume, be unable to tax any cost for the plaintiff, unless the judge who tried the cause can supply what is necessary, and any application for that purpose will probably raise a question as to how the fifth clause of the Dower Act can and must be carried into effect. I mean as to the time and mode of supplying proof of what was "made to appear on the trial," respecting the demand, on the one hand, and the offer to assign dower, on the other. Upon that point the statute is not explicit.

McLEAN, J.—I see no sufficient reason for disturbing the verdict. The only witness called was on the defence, a son-in-law of the defendant. He stated that dower had been offered to the demandant's agent soon after the service of a demand, but he stated at the same time that he had ordered the party who made the demand out of the house, though not himself a resident in it at the time; and from the ques-

tions put to the witness as to his offering to indemnify the defendant if he would kick Waldron out, the jury may have been satisfied that his evidence could not be relied on. Besides it is evident that the defendant was aware that the demandant was claiming dower in the premises on the 5th of July, 1856, and nothing seems to have been done between that day and the 18th of May following, with a view of settling for or assigning dower. From the facts disclosed, I think the jury were warranted in rejecting the evidence given to support the plea, and in finding for the demandant. There was no claim on the record for damages, and no evidence to shew the demandant entitled to damages, so that the amount found by the jury should be struck out. The right to costs must depend upon the service of a proper notice demanding dower, but the want of such notice does not form a ground for setting aside a verdict.

I think the finding of damages being unwarranted must be struck out, but the rule in other respects must be discharged.

BURNS, J., having been absent during the argument, gave no judgment.

Rule absolute to strike out the damages. (a)

BURNETT ET AL. V. McBEAN.

Agreement to make bricks for plaintiff—Construction of—When the property vests.

In an action to try the right to certain bricks, it appeared that they had been made by one D. for the plaintiffs, who were to find the wood to burn the kilns, and deduct it from the price, and had supplied wood to the extent of several hundred pounds. The bricks had not been delivered, and defendant claimed them under an assignment from D.

Held, that it was properly left to the jury to say whether by the agreement between the plaintiffs and D. the bricks were to become the plaintiffs' property as soon as they were made; and that under the evidence, given below, they were justified in finding that they were.

REPLEVIN, for two kilns of bricks.

Pleas—1st, Not guilty. 2nd, That the bricks were not the plaintiffs'.

At the trial, at Cobourg, before *Draper*, C. J., it appeared

(a) See *Bishoprick v. Pearce*, 12 U. C. R. 306; *Quin v. McKibbin*, *Ib.* 323; *Anderson v. Marriott*, 14 U. C. R. 161.

that the plaintiffs had taken a contract to build a town hall, and agreed with Joseph H. Dean to make bricks for them. The plaintiffs agreed to find wood to burn the kilns, and did find it to the amount of several hundred pounds, and were to deduct the cost of the wood from the price they were to pay for the bricks, which was fixed at a certain price per thousand.

One witness swore that the bricks were to be manufactured by Dean for the plaintiffs, who got them as they wanted them.

It was proved by several persons that after the bricks were burnt they went to Dean to purchase some from him, but that he referred them to the plaintiffs, saying the bricks were theirs.

In November, 1857, Dean left the country. The bricks had been made by him in a field that belonged to the defendant McBean, which Dean had leased from the defendant for a term of years. Before he went away he gave up his lease to the defendant, who entered and detained the bricks, claiming them under an assignment which Dean had made to him of his property before he left the province.

The bricks were by Dean's directions inserted in the schedule of property assigned.

There was evidence that Dean, before he went, sold parcels of the brick to persons who applied to buy, and received the money for them.

There was no written contract between him and the plaintiffs.

The learned Chief Justice left the case to the jury, with a direction that if the bricks were made upon the understanding between the parties that they were to be manufactured for the plaintiffs, and were to be theirs as they were made, without any delivery being necessary, then the plaintiffs should recover, but if they were Dean's bricks as they stood in the kiln, then it was necessary that the plaintiffs should have shewn some act done after they were made by which the property became vested in the plaintiffs, of which he did not see any proof.

The jury found for the plaintiffs.

Galt moved for a new trial on the law and evidence,

and because the verdict was contrary to the judge's charge.

Cameron, Q. C., shewed cause, and cited *Blackburn on Sale*, 159, 161, 202 ; *Laidler v. Burlinson*, 2 M. & W. 602 ; *Woods v. Russell*, 5 B. & Al. 942.

ROBINSON, C. J., delivered the judgment of the court.

The case went with a proper direction to the jury, and the verdict seems just. It was competent to the parties to agree that the bricks when made should be the property of the plaintiffs without any formal delivery. Such an arrangement would not be unreasonable, and therefore it is not unlikely that the parties were upon that footing, for the plaintiffs expended a large sum of money in providing the wood with which the bricks were burnt, and the boards with which they were covered while they were being made.

We have often had it proved that in transactions among lumbermen agreements on the same principles are not uncommon. A merchant often makes advances to parties engaged in getting out lumber, and upon the understanding that as fast as the lumber is got out the property in it shall vest in him. This is done, no doubt, in order to prevent the danger of that happening which has happened here, namely, that after the timber has been got out, in a great measure at the expense of the person for whom it was intended, some one else might come and seize it to pay a debt of the person who was preparing it for market, or that person might dishonestly assign it in order to meet some other claim, or might convert it into money, and defraud the person with whom he had contracted.

The jury were told, that the question for them was, whether the bricks were or were not made on the understanding that they were to be the property of the person for whom they were being made as soon as they were completed, without any formal delivery, or any thing more to be done. The conduct of Dean, as proved by several witnesses, in referring parties who wanted to buy of him to the plaintiffs as the owners of the bricks was sufficient, if the jury believed the witnesses, to satisfy them that the property in the bricks was in fact in the plaintiffs according to the agreement be-

tween the parties. It was certainly very unfair in Dean, as he was absconding, to make over the bricks to secure parties who had endorsed notes for him.

We are of opinion that we should do wrong to disturb the verdict.

Whether Dean had or had not been paid in full by the plaintiffs for the bricks before he went away does not appear in the evidence. If he has not been paid in full, he has of course his remedy against the plaintiffs for any balance that may be due.

Rule discharged.

HOWELL V. MCFARLANE.

Assignment—Construction of—Fraud—Absconding debtor—Attachments.

W., being indebted to B. and to the plaintiff, absconded, and B. attached his goods; but he afterwards returned, and made an arrangement, on which the attachment was withdrawn. W. then executed an assignment to the plaintiff, which recited that he was indebted to him "in a large sum of money," and assigned "all and singular his stock in trade, chattels, debts," &c., and "all his personal estate and effects whatsoever and wheresoever," upon trust to sell and pay the plaintiff (the assignee) all indebtedness and moneys due and owing by W. to him, and to pay the surplus, if any, to W. He left the province next day: the plaintiff took possession of the goods, and the defendant some weeks after sued out an attachment for a debt due him by W. An interpleader issue having been directed, the jury found that the assignment was made in good faith to secure a debt due.

Held, that as there had been a change of possession, the statute 20 Vic., ch. 3, did not apply, otherwise the description of the goods would have been insufficient.

Held, also, that the assignment could not be upheld, for it neither specified the amount secured, nor gave any schedule of the goods and debts.

INTERPLEADER ISSUE, to try whether certain goods seized by the sheriff of the county of Norfolk, under an attachment tested 26th of October, 1857, and issued from the Queen's Bench, against the goods of one George Wilson, an absconding debtor, at the suit of defendant, McFarlane, were, at the time of the delivery of such attachment to the sheriff, the property of Howell, the plaintiff.

At the trial, at Simcoe, before *Hagarty, J.*, it appeared that Wilson and the plaintiff entered into partnership in September, 1854, the plaintiff having advanced money, and given a mortgage on his real estate to one Thompson, to secure debts incurred to a large amount by the purchase of

goods for the firm, Wilson on his part contributing nothing. The plaintiff was father-in-law to Wilson. They carried on business together till March, 1856, when they dissolved partnership, on the terms that Wilson was to take the stock on hand, and the book debts, and to pay all the debts of the co-partnership; and Wilson gave his notes to the plaintiff for £1,200, in consideration of the advances which the plaintiff had made to the co-partnership. Wilson then continued the business alone, and became largely indebted to Buchanan, Harris & Co., for goods which he bought of them.

In the summer of 1857 he became embarrassed, and left the province, having confessed judgment to the plaintiff for the debt due upon his notes, and leaving goods at Port Dover.

Buchanan, Harris & Co. took out an attachment against Wilson as an absconding debtor, on the 5th of August, which was received by the sheriff on the 20th of August, on which day also the sheriff afterwards received a *fi. fa.* against Wilson's goods at the suit of the plaintiff, Howell.

Afterwards, in August, 1857, Wilson returned to Canada, and made an arrangement with Buchanan & Co., by giving them notes made by the plaintiff, and indorsed by Wilson, for the amount of his debt to them, in consequence of which Buchanan & Harris, on the 22nd of August, wrote to the sheriff to withdraw the attachment, and it was withdrawn on the 27th of August.

On the 25th of August Wilson, in order to secure the plaintiff in the debt he owed him, and in the amount for which he had made himself liable to Buchanan & Co., executed an assignment to the plaintiff, which recited that he was indebted to the plaintiff "in a large sum of money," which he was unable to pay, and that he had proposed and agreed to assign to the plaintiff all his stock in trade, goods, chattels, debts, &c.; and by the indenture Wilson assigned to the plaintiff "all and singular the stock in trade, wares, merchandize, household goods, furniture, implements, chattels, goods, debts, sum and sums of money, books of account, notes, and other debts due and owing to him, Wilson, and all his personal estate and effects whatsoever and wheresoever, and all his estate and interest therein:" to

hold to the plaintiff upon trust to sell the same for cash, or on credit, and to apply the proceeds, first, to paying the expenses to the trust; secondly, to pay the plaintiff "all indebtedness and moneys due and owing by Wilson to him, and all interest thereon; and thirdly, *to pay the surplus*, if any, to him, Wilson, on *demand*. Wilson left the province again, on the day after he made the assignment, being then indebted to Buchanan & Co. in £1,900, and in all, including that debt, £3,800.

The defendant, McFarlane, sued out an attachment against Wilson's goods, on the 26th of October, 1857, at which time the plaintiff was in the possession of the goods.

After the assignment the plaintiff carried on the business at the shop Wilson had left, until the sheriff came and closed the shop.

Wilson swore that when he executed the assignment, the sheriff was in possession of the goods, under the attachment at the suit of Buchanan, Harris & Co., and the *fi. fa.* at the suit of the plaintiff.

The attachment which the defendant sued out in October, 1857, was for a debt contracted by Wilson with him after the dissolution; and when that writ was sued out, the prior attachment at the suit of Buchanan, Harris & Co., and also the *fi. fa.* at the suit of the plaintiff Howell, were withdrawn, by instructions to the sheriff from the plaintiff's attorney, and Howell was in possession of the goods.

It was objected by defendant's counsel—1st. That the attachment taken out by Buchanan, Harris & Co., enured to the benefit of all other creditors who had sued out attachments subsequently, and within six months; and that no arrangement made with the first attaching creditors could interfere with the rights of the plaintiffs in such consequent writs.

2ndly. That the assignment which was executed by Wilson at Hamilton did not pass the property, for want of registry, or of immediate and continued change of possession; and that the resulting trust in favour of Wilson himself made it void.

It was left to the jury to say, whether the assignment by

Wilson to the plaintiff was made honestly and in good faith to secure a debt actually due; and they found in favour of the plaintiff.

M. C. Cameron obtained a rule *nisi* for a new trial, on the law and evidence.

Freeman, Q. C., shewed cause. C. L. P. A. 1856, secs. 43, 47, 49, 57 were referred to.

ROBINSON, C. J., delivered the judgment of the court.

Upon some points in the case the evidence is rather obscure, but in regard to the *bona fides* of the assignment, under which the plaintiff claims, we see no reason for doubt—so far that it seems satisfactorily made out that there was at the time a large debt honestly due by Wilson to the plaintiff.

Then it also appears that this was not a case in which any thing should turn upon the provisions of the Chattel Mortgage act, for it cannot be said that Wilson continued in possession after executing the assignment; on the contrary, he had left the province some time before, having apparently abandoned the possession of his goods; and after executing the assignment he immediately departed again from the province, leaving the plaintiff to do, with regard to the possession of the goods, whatever he thought proper; and the plaintiff did take upon himself the management of the property, which continued to be disposed of under his direction, until the sheriff came, in October, 1857, and seized the goods, and shut up the shop, assuming a right to do so by virtue of the attachment against Wilson's goods sued out by McFarlane, which was placed in his hands in October, 1857.

We cannot, we think, hold that a necessity existed for registering the assignment; and that being the case, the fourth clause of the Chattel Mortgage act, which requires a full description of the goods, by which they may be readily known and distinguished, to be inserted in the mortgage or bill of sale, does not in our opinion apply to this assignment. If it had applied, we should have been obliged, we think, to hold this assignment void for the want of that description.

Looking, however, at the contents of the assignment, can we or can we not hold that there is that upon the face

of it which made it so clearly objectionable on the ground of actual or legal fraud that the jury were bound to pronounce it fraudulent?

It was left to them to determine upon the point of fraud, as the proper course is in such cases, and they upheld the assignment. Now was such a finding wrong upon the evidence? It seems to us that there is much on the face of this assignment to create suspicion. It specifies nothing as to the amount of the plaintiff's debt, while it assigns every thing that Wilson was possessed of to pay a debt of unnamed amount, and which, for all that the rest of the world could know, might either be large enough to make the assignment fair and reasonable, or so small as to make it much the contrary. Then all the personal property that Wilson owned, his stock in trade, household goods, furniture, chattels of every kind, and all the debts due to him, were by this instrument made over to his father in law, the plaintiff, with authority to sell and to pay all the surplus of proceeds above the unnamed and unknown debt due to the plaintiff into the hands of Wilson himself. There is no schedule of goods or of debts assigned, nor any information of their value, which can enable creditors to see how much has been tied up, on the pretence of securing the debt to Howell.

We think such an assignment ought not to be upheld, for if it were, then, under pretence of securing a debt of a few hundred pounds, a property worth many thousands may be put out of the reach of legal process, and the goods turned into money to be remitted to the absconding debtor, while all his other creditors remain unsatisfied.

In our opinion there should be a new trial, with costs to abide the event; and this independent of the question raised, whether the goods could be assigned by Wilson, under the circumstance of their having been attached at the suit of Buchanan, Harris & Co., and of their having been made subject, as is assumed, to the second attachment sued out by McFarlane. The Absconding Debtor Act contains no express provision as to what is to be done in such a case with the property of the absconding debtor, when the creditor at whose suit it was first attached fails in his action, or is

satisfied his debt. Without going further into that point at present, I must say it is my impression, that under the circumstances of this case, when the first debt had been arranged, and the goods restored to the possession of the party, before any other attachment came, such second attachment did not disable the debtor from disposing of them.

Rule absolute.

FERRIS V. THE GRAND TRUNK RAILWAY COMPANY.

Railway company—Horse getting on track from highway—20 Vic. ch. 12, s. 16.

In an action against a railway company for not erecting fences and cattle guards, whereby the plaintiff's horse got on the track and was killed, there was evidence to shew that the horse escaped from the plaintiff's field into the street within half a mile of the railway, and thence upon the track.

Held, that if so the plaintiff was precluded from recovering by the 20 Vic., ch. 12, sec. 16, though the horse was not killed at the very point of intersection.

This was an action against the defendants for neglecting to put up fences and make cattle guards, in consequence of which the plaintiff's horse got upon the railway, and was killed.

Flea.—Not guilty, by statute.

At the trial, at Kingston, before *Draper*, C. J., it was proved that the plaintiff's lot of land, No. 36, in the fifth concession of Pittsburg, had a public road along its west side, which crossed the railway. There were cattle guards at the crossing.

On the 29th of October last the plaintiff's horse got out of his field from defects in his fences, in the night, and got into the road, and off that, as the jury found, upon the railway. There was no certain proof of the manner in which he got upon the railway, or at what point on the railway he was struck; but it appeared to a person who saw him lying dead by the side of the railway next morning, that the horse had been on the west side of the cross road, and that he was carried by the locomotive eastward, over both of the cattle guards, and killed. The fences of the field in which the horse had been left were found to be low, some of the rails being down at a point on the cross road half a mile distant from the intersection with the railway.

It was left to the jury to say whether the horse escaped from the plaintiff's field by defect of his fences; whether he had got across the cattle guards, and was on the railway track on either side of the cross road; or whether he was on the railway track between the cattle guards when he was struck; and to assess the value of the horse.

The jury could not find how the horse got out of the pasture, but that he had crossed one of the cattle guards, and was on the railway beyond it when he was struck by the train; and they found the value of the horse to be £22 10s. Leave was reserved to the defendant to move for a nonsuit, on the ground that by the late act 20 Vic., ch. 12, sec. 16, or as the law stood before that act, the plaintiff was disabled from recovering.

The case was in fact undefended at the trial, being called in its order on the second day of the assizes, before the defendants' counsel and witnesses were in attendance.

Bell obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, or for a new trial on the law and evidence.

Read shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is objected that the declaration was not supported by any evidence as respects the alleged want of fences to the railway track, or want of cattle guards, and there seems indeed to be an absence of proof of those material allegations.

1. There was no proof that the fences of the railway company were defective, or that there was not proper cattle guards, so that the plaintiff has not established that the loss he has suffered arose from the neglect he complained of; and that certainly was necessary to be shewn, in order to sustain his action, for no negligence or improper conduct is complained of in driving the train.

2ndly. If we are to take it that the horse came along the cross road upon the railway, then what is the effect in this case of 20 Vic., ch. 12, sec. 16? I think the effect of it is to disable the owner of cattle, &c., to recover for any animal that has got on the railway track from a cross road, contrary to the act, even though it may not have been killed at the

very point of intersection, for such animal has got on the track by being allowed to be at large on the highway contrary to the act of parliament, and was therefore unlawfully on the track ; the consequence of which is, that the company would not be liable for what happened to him, unless it arose from wilful misconduct or negligence in the conduct of their trains. We think a nonsuit should be entered.

Rule absolute.

MEYER ET AL. V. HUTCHINSON ET AL.

Promissory Note—Damages.

A note made here, payable in New York, but not there only, is not within the 12 Vic. ch. 76, sec. 3, so as to entitle the holder to four per cent. damages on protest for non-payment.

The plaintiffs sued defendants as indorsers of a promissory note made by Kynder and Charlesworth, at Toronto, on the 22nd of October, 1857, promising to pay to defendant Hutchinson, or order, at the Merchantile Bank, in New York City, 564 dollars and 41 cents, with cash rate of exchange.

At the trial, at Toronto, before *Richards, J.*, it appeared that the note was duly presented at the Merchantile Bank, in New York, and protested for non-payment. The plaintiff claimed four per cent. damages under the statute, as upon a foreign note, and leave was reserved to move to increase the verdict upon the note, by adding such damages.

S. M. Jarvis obtained a rule *nisi* accordingly ; to which *McMichael* shewed cause.

ROBINSON; C. J. delivered the judgment of the court.

We cannot hold that this note, being made in Upper Canada, payable in New York, but not in New York "only, and not otherwise, or elsewhere," is, by reason of its being made payable in New York, within the the third clause of our statute 12 Vic., ch. 76, so as to give the holder a right to four per cent. damages upon its being protested for non-payment.

In this case, and the other, of the Royal Bank of Liver-

pool v. Whittemore et al (a), we have considered the judgment given in the Court of Common Pleas, Ross v. Winans (5 C. P. 185), but do not find that it bears on the point raised in either of the cases now before us.

Rule discharged.

JONES V. THE PROVINCIAL INSURANCE COMPANY.

The declaration stated that defendants, in consideration of £28 paid to them as the premium of insurance of £1500 on certain property described in the plaintiff's application, promised to insure him against loss by fire to the amount of £1500 until notified to the contrary, subject to the conditions of the policy—that is, the policy usually issued by defendants in like cases: that the property was destroyed by fire, and although the plaintiff had done all things necessary on his part, yet defendants had not paid him the sum insured.

Held bad, the action for non-payment of the money not being maintainable without a policy under defendants' corporate seal.

DECLARATION: That the defendants on the sixth day of October, 1857, in consideration of £28 2s. 6d., paid to them by the plaintiff, being the premium of insurance upon £1500, assured to him, the plaintiff, for one year, from the day and year last aforesaid, on property described in his, the plaintiff's application, dated the day and year last aforesaid, did promise and agree to and with the plaintiff to insure him against loss or damage by fire on the said property, to the amount of the said sum of £1500, until notified to the contrary, subject to the conditions of the policy (meaning the policy usually issued by the defendants in like cases.) And the plaintiff saith, that the property described in the said application was a certain flouring mill, with frame buildings thereto attached, belonging to the plaintiff, situate in the township of Yonge, in the county of Leeds, and more particularly described in his said application. And the plaintiff further saith, that after the said day and year last aforesaid, and before the expiration of the said year, the said property, then still being the property of the plaintiff, was burnt and

destroyed by fire; and although the plaintiff from the time of the making of the said agreement hitherto hath well and truly observed, performed, fulfilled, and kept all the conditions precedent on the part of the plaintiff to be observed, performed, fulfilled and kept, according to the true intent and meaning of such usual policy as aforesaid, and the conditions thereof; and although the plaintiff was never previous to the said burning and destruction of the said property, notified to the contrary, but that he was insured as aforesaid, and although all things have been done and happened to entitle the plaintiff to receive of and from the defendants the said sum of £1500, insured by them as aforesaid, yet the defendants have not paid the plaintiff the said last mentioned sum of money, or any part thereof.

Demurrer—that the plaintiff shews no right to recover, and seeks to recover a claim under an insurance not shewn to have been made, and not made, under the corporate seal of said defendants; nor does it shew that they could make such a contract as therein stated, otherwise than under their corporate seal.

J. Duggan for the demurrer.

Sherwood, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

It was stated in the argument that this is not the case of a renewal insurance for which a policy had before issued, but the application was for an original insurance, and the premium being paid no policy had yet issued.

We are not under the impression that this would make any substantial difference, though the plaintiff may appear to be under greater difficulty in sustaining an action like the present when no policy had ever been granted upon the risk, than where there had been one upon the same risk, which had expired, and the premium had been paid for renewal.

No authority has been cited that can sustain this action, and we have no doubt that we cannot support it. If no policy has issued, but the plaintiff can prove an agreement to insure, in which the terms have been so fully settled by the parties, that nothing remains to be done but to deliver

the policy, then the assured may have a remedy at law in an action for not delivering the policy, or he may be relieved in equity.

The subject is best discussed in Angell's treatise on fire and life insurance, in his third chapter.

The plaintiff in this case has declared as if the property was in effect assured by reason of the payment of the premium, and of defendants' parol promise to insure, for he states as the breach, not that the defendants did not execute a policy, but that they did not pay the loss.

It seems that the plaintiff's best remedy would be in equity, under the circumstances of this case, but we are persuaded that no authority can be shewn for sustaining an action in this form against an incorporated company, for it assumes that the company can actually bind themselves in a contract for insurance made by parol.

Judgment for defendants on demurrer.

KINGSMILL V. WELLER.

Bond to indemnify sheriff for not selling under fi. fa.—Recovery against him in county court—Plea, that by paying he prevented an appeal—Evidence.

A sheriff sued upon a bond of indemnity given him by defendant for not selling goods, alleging a verdict and judgment against him in the county court, which he had been obliged to pay. Defendant pleaded, that he had defended the action for the plaintiff, and moved for a new trial, which was refused : that he then gave a bond to appeal, according to the statute, and applied to the judge to certify the proceedings, but the plaintiff (defendant in that action), without notice to defendant, and against his will, paid the money, by means whereof defendant was prevented from prosecuting the appeal, and from procuring a stay of proceedings on the execution. It appeared that no bond had been given until the fifth day after the judgment was entered, and that the judge of the county court had on that ground refused to interfere.

Held, that the plea was not proved, for the appeal was not prevented by the plaintiff's payment, as alleged, but by the entry of judgment.

Quare, whether it formed a good defence.

The sheriff of the counties of Lincoln and Welland had seized certain goods under a *fi. fa.* from the county court in a suit of Wells et al. v. The Grand Trunk Telegraph Company, as being the property of the defendants in that suit ; but the defendant in the present action, Weller, claimed the goods seized as his, and gave his bond to save harmless and indemnify the plaintiff, Kingsmill, from and against all

damages, verdicts, actions, suits and causes of action, and from and against all judgments, executions, claims, demands, loss, damage, costs and charges, which he should at any time thereafter be put to in consequence of his not selling, and returning *nulla bona* to the writ.

The plaintiff sued in this action upon this bond, setting out the condition, and assigned as a breach that defendant did not save harmless, &c., but that an action being brought against this plaintiff for an alleged false return of *nulla bona*, a verdict was rendered against him for £25 3s. 10d., and judgment was thereon obtained for £36 13s. 1d. for damages and costs, upon which execution issued, and the plaintiff was obliged to pay, and did pay, &c., and that the defendant had not saved him harmless and indemnified him, &c.

The defendant pleaded, that after Kingsmill was sued for a false return, he, the defendant, did, at the request of the plaintiff, the said Kingsmill, undertake the defence of the action, and that after verdict and before judgment, the defendant, on behalf of the said plaintiff, moved for a new trial, on certain grounds stated: that his application was refused: that the chattels seized under the *fi. fa.* were proved at the trial to belong, and did in fact belong to this defendant, and were not liable to seizure under the writ: that this defendant was dissatisfied with the decision of the county court upon the application for a new trial, and did, according to the statute, give a bond with two sureties, who justified, conditioned to abide by the judgment, and pay the damages and all the costs of the suit, and of the appeal in case the judgment should be affirmed; and did thereupon, acting for the present plaintiff in the defence of that action, move the judge of the county court to certify the proceedings, in order to appeal to the Court of Queen's Bench, which said application was made before the payment by the defendant in the declaration mentioned, and before the next term of the Queen's Bench after the said decision: that the defendant was about to set down the same matter, which the judge should have certified, for argument at the next term of the Queen's Bench, according to the statute, of all which

that plaintiff had notice: that this defendant had no notice of the execution having issued against the plaintiff, Kingsmill; and that the plaintiff, Kingsmill, after the said application, and before the judge had certified, and before the next term of the Queen's Bench, and without notice to the defendant, and against his will, paid the money in the declaration mentioned, and by means thereof the defendant was prevented from prosecuting his appeal, and from procuring proceedings upon the execution to be stayed; and so, he concluded, the plaintiff was damnified of his own wrong, and without any default or breach of the condition on the part of the defendant.

The plaintiff took issue on this plea.

At the trial, at Niagara, before *McLean*, J., it appeared that the case of *Wells v. Burgoyne* was tried in July, 1857. Judgment was given on the 23rd of October, discharging the rule *nisi* for a new trial: execution issued on the 28th of October, 1857, and was returned on the 29th by the coroner "money made." On the 28th of October, at three P.M., the judge of the county court received the first information of an intended appeal, but no bond was presented; and the judge, being obliged to leave home on the 29th, went to St. Catharines, and did not return home till the 31st, when he found that judgment had been signed, and execution issued at the closing of the clerk's office on the 28th of October, the fifth day after the judgment had been given that it was desired to appeal from. After the judgment was entered the judge of the county court thought he could not interfere, and said he would not have interfered if a proper bond had been then presented to him.

On the 3rd of November an appeal bond was brought to him, but the judge declined to interfere. The bond was not executed by the plaintiff till the 3rd of November, and it was not till that time that notice was given to this plaintiff of an intention to appeal.

The money was paid by the deputy sheriff, and without the knowledge of the plaintiff, so far as was proved, and a witness swore that he *thought* the deputy sheriff was aware of an intention to appeal against the judgment.

The learned judge told the jury that the evidence appeared to him to prove that the appeal was not prevented by the payment of the amount of the verdict, as the plea alleged, but by the fact that the judgment was entered, and that, in the opinion of the judge of the county court, after such entry the application came too late. The jury thereupon found a verdict for the plaintiff, and assessed the damages at £40 2s. 7d.

Patterson obtained a rule *nisi* for a new trial, on the law and evidence, and for misdirection. He contended that the entry of judgment would not have precluded the appeal if the plaintiff, Kingsmill, had not paid the money; and that it should have been left to the jury to say whether the plaintiff, either by himself or his deputy, knew of the defendant's intention to appeal, and of his proceedings for that purpose. Also, that the plaintiff should have given notice to defendant of his intention to pay the money, or of the fact of an execution having issued. He cited 8 Vic, ch. 13, sec. 57; 12 Vic., ch. 66, sec. 11.

W. Eccles shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion the plea was not proved, for, as the learned judge at the trial remarked, it was not the payment of the money by the plaintiff under the compulsion of an execution that prevented the appeal, but the fact that the learned judge of the county court refused to certify the proceedings in order to an appeal, because judgment had been entered before such an application had been made to him as the law requires, and because he considered that he could not on that account comply with the application. The appeal did in fact fall through, not from anything done or omitted by the plaintiff, as pleaded, but from the failure of a proceeding which the defendant had taken upon himself to carry through.

Without determining therefore whether the plea, if proved, would have constituted a good defence, it was in fact not proved; and we must therefore discharge this rule for a new trial, for the plaintiff was properly allowed to recover.

Rule discharged.

MARTIN V. ARTHUR.

Sale of land subject to mortgage—Promise to indemnify against mortgage—Declaration—Practice in demurrer.

Declaration, that in consideration that the plaintiff would sell and convey to defendant certain lands for £275, which were then subject to a mortgage for £700, defendant promised to pay off said mortgage, and save the plaintiff harmless therefrom: that in pursuance of said agreement the plaintiff then sold and conveyed said lands to defendant: that the defendant not having saved harmless the plaintiff from said mortgage, and the sum of £123 being due thereon, the plaintiff was obliged to pay it, of which the defendant had notice, but hath not repaid the same to the plaintiff, or indemnified him for such payment.

Held, good, on demurrer.

Where there is a demurrer to a plea, and exceptions are taken to the declaration, if the plaintiff on argument abandons the demurrer, the court will not give judgment on the exceptions. See note at the foot of next page.

The second count of the declaration alleged, that in consideration that the plaintiff would sell and convey to defendant certain lands and premises at and for the sum of £275, which said lands and premises were then subject to a certain mortgage to secure the payment of £700 with interest, payable in manner and at the times therein set forth, he, the said defendant, then promised and agreed to pay off and discharge the said mortgage, and to save harmless and indemnify the said plaintiff from all claims and demands in respect thereof; and in pursuance of the said agreement, he, the said plaintiff, then sold and conveyed to defendant the said lands so subject to the said mortgage: that the defendant not having saved harmless and indemnified the plaintiff against the said mortgage, and the sum of £123 10s. being due and unpaid thereon, he, the plaintiff, on the tenth day of August, 1856, was compelled and obliged to pay, and did pay the said sum of £123 10s., being then due and payable by virtue of the said mortgage, whereof the defendant had notice; nevertheless the defendant, disregarding his said promise, hath not as yet repaid to the plaintiff the said sum of £123 10s., or any part thereof, nor in any manner indemnified him on account of having paid the same, although requested by the plaintiff so to do, but hath hitherto wholly neglected and refused, and still does neglect and refuse so to do.

Defendant demurred to this count, marking as the points of law intended to be argued, that the said count shews no sufficient consideration for the making of the said alleged

promise by the defendant, and that the said promise is void under the statute of frauds for not being in writing, and that the said count does not shew any legal cause of action against the defendant, nor shew any money paid to any one who had a right to receive the same.

Hector Cameron, for the demurrer, cited Chy. Plg. I. 152.

C. Robinson, contra.

There was also a demurrer to defendant's plea to the first count of the declaration, and notice of exceptions to that count, but this demurrer was given up by the plaintiff on argument.

ROBINSON, C. J.—The demurrer to the first plea was given up on the argument, and there is therefore no longer a question about the sufficiency of the first count, to which alone that plea was an answer. Judgment on that demurrer is given for the defendant. (*a*).

As to the second count, it is sufficient in my opinion. If a writing were necessary in order to prove such an undertaking as is there alleged, on the ground that it is a contract concerning land, still it is never necessary to state in the declaration that the promise was in writing, though it is otherwise when such a contract is relied upon in a plea. The plaintiff on the trial must prove a valid promise. There is a sufficient consideration stated for the undertaking sued upon.

MCLEAN, J.—The plaintiff abandoned the demurrer to defendant's plea, and the issue is taken upon the declaration by that plea, so that the defendant cannot now attack the count of the declaration to which his plea is an answer. The only matter for consideration therefore is the demurrer to the second count.

As to the first objection, that the count shews no suffi-

(*a*) *Note*.—The defendant's counsel suggested that he was entitled to judgment that the first count was bad, or at least to have it adjudged whether it was good or bad, but the court held that when the plaintiff gave up the demurrer to the plea in answer to that count, that entitled defendant to judgment on that demurrer, without going into the question of the sufficiency of the count, which the plaintiff thus admitted was well answered.

cient consideration for the defendant's promise, I am at a loss to see how it can be urged. The count states the consideration to be the sale and conveying to the defendant of a certain parcel of land subject to a mortgage, and the plaintiff alleges that he did sell and convey the premises to the defendant, and that, though defendant promised to pay the mortgage, as the same became due, he failed to do so, and the plaintiff has been obliged to pay the amount. There is surely ample consideration expressed in the count for the defendant's promise.

Then as to the promise being void for not being in writing, there is nothing on which to ground such an objection. The promise may be in writing, though not so stated in the declaration, and it was not incumbent on the plaintiff to allege that the promise was in writing. It is not necessary now to discuss the question whether the alleged promise, even if it were admitted to be a verbal promise, would be sufficient to sustain the action.

As to the last objection, the plaintiff complains that defendant did not indemnify him and save him harmless from the payment of a certain sum of money according to his promise, and that the plaintiff was in consequence obliged to pay, and did pay, the amount of an instalment on the mortgage. On that allegation the defendant can take issue, and the plaintiff will have to prove payment to a person entitled to receive the money, or he cannot compel defendant to pay him.

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for the plaintiff on demurrer.

BEEMER V. THE ANCHOR INSURANCE COMPANY.

Policy of insurance—Right of action by assignee.

An assignee of a policy of insurance cannot sue on it in his own name, although the company agree thereby to indemnify the assured and his assigns.

The plaintiff declared on a policy of insurance against fire, for £500, granted by defendants to one Spraker, alleg-

ing that Spraker, at the time of making the policy, was owner of the premises insured, "and continued so until he conveyed and assured the said premises unto the said plaintiff, and assigned the said policy of insurance unto the said plaintiff, by assignment bearing date the twenty-sixth day of October, 1857; and the said plaintiff, being so interested, gave notice thereof, and of such assignment to the said defendants, who consented thereto, and endorsed the same upon such policy; and the plaintiff further says, that he, the plaintiff, from and after the said assignment to him of said policy, and until the loss and damage hereinafter mentioned, was interested in the said insured premises as the owner of the same." The declaration then alleged the destruction of the premises by fire, and non-payment to the plaintiff.

Defendants demurred, on the ground that the policy, being in the nature of a chose in action, could not be sued upon by an assignee thereof in his own name.

MacLennan, for the demurrer. *D. B. Read*, contra.

Fenner v. Meares, 2 W. Bl. 1269; *Duer on Insurance*, 53; *Master v. Miller*, 4 T. R. 342; *Johnson v. Collings*, 1 East 104; *Weston v. Barker*, 12 Johns. 280; *Compton v. Jones*, 4 Cow. 13, were cited on the argument.

ROBINSON, C. J., delivered the judgment of the court.

There is no averment in this declaration of any statutory provision binding upon us, which allows the insured, in case of assignment of the interest insured and of the policy, either with or without the consent of the company, to sue in his own name in a court of law; and certainly upon the principles of the common law, knowing no more of the case than appears on the record, the action is not maintainable in the name of the assignee.

In Angell's *Treatise on Insurance*, ch. 9, secs. 211, 212, 215, the law on this point, as it respects policies of insurance against fire, is particularly discussed, and is laid down as we have stated it. The fact that by the policy granted to Spraker the defendants engaged to indemnify him and his assigns, does not alter the case as regards the formal objection, that at common law a chose in action cannot be

assigned. It is the common case of bonds and covenants to pay money, which usually bind the party to pay to the other or his assigns, but yet the action must be brought in the name of the original obligee or covenantee.

Mr. Angell shews us that in some cases in American courts the assignee of the interest and of the policy has been allowed to sue in his own name, not upon the original covenant, but upon an express promise made to him as assignee, supported by the consideration of the exemption of the underwriter from further liability to the vendor, and the premium already paid for insurance for a time not yet expired. It has been treated in such cases as a new and valid contract between the underwriter and the assignee.

If the authority of such cases could be recognized as applying not to an action against an underwriter, but against an incorporated company, yet they would not avail in this case, which is not founded upon any such new contract, but expressly on the original policy.

Judgment for defendants on demurrer.

REGINA V. BREDEN ET AL.

Inquisition—Uncertainty.

Held, that the inquisition in this case was bad, for the principal was not sufficiently charged either with manslaughter or murder; and it was uncertain which crime it was intended to charge the others as aiding in, although they were said to have been present at the "murder aforesaid."

Cameron, Q. C., moved to quash an inquisition, which had been removed into this court by *certiorari*, taken by a coroner in the county of Perth, on the body of Samuel Fleming, on the grounds, 1. That it did not charge the death to have arisen directly from the act of Oliver Breden, the party charged with the homicide. 2. That though the said Oliver Breden was not charged by the inquisition with murder yet the said Richard Breden and Thomas Breden were, charged with aiding and abetting in the felony and murder aforesaid.

The jury found that the said Samuel Fleming came to his

death in manner following : that one Oliver Breden, late of the township of Wellesley, in the county of Waterloo, farmer, with force and arms, at the township of Mornington, in the county aforesaid, on the 7th day of May, &c., in and upon the said Samuel Fleming, in the peace of God and of our said Lady the Queen then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault ; and that the said Oliver Breden, with a certain rifle of the value of twenty shillings, &c., in and upon the right shoulder and chest of him, the said Samuel Fleming, did then and there shoot and kill. One rifle ball did pierce the said shoulder and chest of him, the said Samuel Fleming, of which shooting and killing he, the said Samuel Fleming, did then and there instantly die. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Oliver Breden him, the said Samuel Fleming, in manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did shoot and kill, against the peace of our Lady the Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further say, that Richard Breden, late of Mornington, in the county aforesaid, farmer, and Thomas Breden, of the township of Wellesley, in the county of Waterloo, farmer, at the time of the doing and committing of the felony and *murder aforesaid*, were present, aiding, abetting, assisting, comforting and maintaining the said Oliver Breden to shoot and kill the said Samuel Fleming in manner aforesaid ; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Thomas Breden and Richard Breden him the said Samuel Fleming, in manner and by the means aforesaid, feloniously, and wilfully, and of their malice aforethought, did aid and abet him, the said Oliver Breden, against the peace of our Sovereign Lady the Queen, her Crown and dignity. In witness whereof, &c.

The evidence shewed that Oliver Breden was putting up a shanty upon land which he claimed some right to, and that apprehending, from threats which had been used, that Fleming and others, upon some claim of right on the part of Fleming, would come to prevent him, the three Bredens

had provided themselves with fire-arms; and that after some altercation between Oliver Breden and Samuel Fleming, during which Oliver Breden ordered Fleming to depart, and Fleming by force was proceeding to pull down the shanty, Oliver Breden struck him several times with a rifle on the hand, and at length shot him. There seemed to be a determination on the part of Fleming to persevere, whatever violence might be offered to him, while the Bredens seemed resolutely determined to prevent him. Fleming brought a number of men with him, who were present when he received the wound, of which he died instantly.

R. A. Harrison shewed cause, and cited 18 Vic., ch. 92, sec. 6; Jervis on Coroners, 207.

Cameron, Q. C., contra, cited Baker on Coroners, 21, 22.

ROBINSON, C. J., delivered the judgment of the court.

The inquisition is very incorrectly framed as regards Oliver Breden, the principal in the first degree. It does not charge as precisely and directly as is necessary in criminal pleadings that the rifle was loaded. There is a want of grammatical connexion in the sentence: the fact is left to be inferred from a very indistinct statement. Then the language is such as makes the inquisition neither amount to a proper charge of manslaughter or murder. The omission of the word "murder" is a fatal and substantial defect in an inquisition intended to charge the crime of murder, and the statement that the defendant did the act wilfully, and of his malice aforethought, is inconsistent with a charge of manslaughter.

As regards the other two defendants, Richard and Thomas Breden, it is uncertain whether the intention of the inquisition is to charge them with being principals in the second degree in murder or in manslaughter, for in no part of the charge, so far as it regards Oliver Breden, is the act termed murder, and yet the other two defendants are charged with being present at the "murder aforesaid." They are not charged with being present and aiding the other to commit the offence of manslaughter, and they could not be legally charged with being present and aiding the other in commit-

ting murder, because Oliver Breden is not charged with murder; that is, not *sufficiently* charged with murder.

In my opinion the inquisition must be quashed.

WOOD V. CLOSTER.

Arbitration—Revocation—7 W. IV., ch. 3, sec. 29—C. L. P. A. sec. 97.

Declaration on a bond of submission to arbitration, setting out an award made, and alleging non-performance. *Plea*, that defendant, before the award, revoked the submission (*not saying by an instrument under seal.*) *Replication*, that the bond was executed after the passing of the Common Law Procedure Act, 1856; that it contained nothing to shew that the parties intended that it should be made a rule of court: that the revocation in the declaration and plea mentioned is the same; wherefore, and by force of the statute, the arbitrators were empowered to proceed with the reference, notwithstanding such revocation, and did proceed, although defendant did not attend. *Rejoinder*, that although the bond was executed after the Common Law Procedure Act, and contains no provision that it should not be made a rule of court, yet neither the bond nor condition was at the commencement of this suit, nor at the time of the revocation mentioned in the plea, a rule of court, or in any way exempted from the effect of the said revocation.

Held, on demurrer to the rejoinder, that both the plea and rejoinder were bad.

Scintle, that the restraint upon revocation without leave of the court or a judge, provided by 7 W. IV., ch. 3, sec. 29, is now extended by the Common Law Procedure Act, sec. 97, to all submissions which do not contain words purporting that they are not to be made a rule of court.

The declaration alleged, in substance, that the defendant by his bond became bound to the plaintiff in £100, conditioned for the submission to the arbitration and award of Charles Simons, David Hanna, and Daniel Trummer, of all differences: that the arbitrators having taken upon themselves the burthen of such arbitration, and the plaintiff and defendant having appeared before them, and produced and submitted their evidence, and the said arbitrators being duly proceeding with the consideration thereof, and with the reference; yet the defendant, without the leave of any court or judge, and against the will of the plaintiff and the said arbitrators, and before the time for making their award had elapsed, and with the intention of revoking the power of the said arbitrators to arbitrate and award as aforesaid, delivered to each of the said arbitrators a notice in writing, concerning the premises, signed with the proper signature of the defendant, but not

under seal, which notice was in the words and figures following; that is to say :

“To Daniel Trummer, David Hanna, and Charles Simons, Esquires,—Take notice that I do hereby revoke your powers as arbitrators, under the submission made to you by Robert Wood and myself, in writing.

“Dated at Hullsville, this 28th day of September, A. D. 1857.

“CHRISTOPHER O. CLOSTER.”

And thereupon the said arbitrators in a due and sufficient manner notified the defendant of the time and place of their then next meeting: that they would close the arbitration thereat; and requiring the defendant to attend then and there with all further proofs and witnesses, if any, which he might wish to tender or submit to such arbitrators concerning the matters in difference above mentioned; and the defendant designedly omitting so to do, with the intention of thereby deterring and preventing the said arbitrators from making their award in that behalf, the said arbitrators, having duly considered all the evidence tendered to them, made and published their award, and thereby, amongst other matters, awarded that the defendant should pay to the plaintiff or his order, the sum of four hundred dollars within one month after the publication of such award, and notice thereof in writing given to the defendant; and that the defendant should pay, or cause to be paid to the plaintiff the sum of fifty-three dollars in full satisfaction of all costs of the said arbitration and award; and that the defendant should, within one month next ensuing the date of such award, execute unto the plaintiff a general release of all actions, &c., for or by reason of anything up to the date of the aforesaid bond of submission; and although the defendant had such notice in writing of the said award, and its publication, as was above contemplated, and although the plaintiff in all respects well and truly observed, performed, and kept every matter and thing by him to be observed, performed, and kept, concerning the premises; yet the defendant had neglected and refused to perform the said award, and to observe per-

form, or keep the condition of the said writing obligatory on the defendant's part.

Plea, that after the making of the submission in the declaration mentioned, and before the making of the award also set forth in the said declaration, the defendant revoked the authority of the said arbitrators, appointed under and by virtue of the said submission, and thereby discharged them from making any award in the premises.

Replication, that the bond of submission in the declaration mentioned was made and executed as therein mentioned, and since the passing of the Common Law Procedure Act, 1856, and since the same came into operation, and that such bond of submission is within the provisions of that statute, and the statutes in such case made and provided: that neither the said bond of submission, nor any condition thereof, contains any word or words purporting that the plaintiff or defendant, the parties thereto, or either of them, intended that it should not be made a rule of court, and that the alleged revocation of the authority of the arbitrators to award, which is in such plea mentioned, is the very same identical attempt to revoke the power of the arbitrators which is in the declaration mentioned, and not any other or different matter or proceeding; wherefore, and by force of the statute in such case made and provided, the said arbitrators were empowered to, and did proceed with the reference, notwithstanding such alleged revocation, and did award, as in the declaration mentioned, although the defendant did not afterwards attend the reference; and the plaintiff further says, that the defendant in the manner above mentioned broke the condition of the said bond for the submission by the defendant to the arbitration, decision and award of the said arbitrators, in manner and form as in the declaration is alleged.

Rejoinder, that although true it is that the bond of submission in the declaration mentioned was made and executed as therein mentioned, and since the passing of the Common Law Procedure Act, 1856, and since the same came into operation, and though neither the said bond of submission, nor any condition thereof contain any word or words pur-

porting that the plaintiff or defendant, the parties thereto, or either of them, intended that it should not be made a rule of court, yet neither the said bond of submission, nor any condition thereof, was at the time of the commencement of this suit, nor at the time of the revocation of the authority of the arbitrators mentioned in the said plea, a rule of court, or in any way exempt from the force and effect of the said revocation.

Demurrer, assigning for causes, that the plaintiff sues upon the bond of submission for breach of the condition thereof, which condition is to submit the matters in difference to the said arbitrators, as well as to abide by and perform the award they should make ; therefore what defendant relies upon as a revocation of the said submission is a breach of the condition of the bond declared upon, as much as the non-performance of the award, assuming it to be not in fact revoked, can be. Also, that as well at common law, irrespective of the statutes, as by the statute in such case made and provided, the submission, being by deed, could not be revoked by such mere parole matter as the defendant supposes. Also, that the particular enactment contained in the twenty-ninth section of the statute 7 W. IV., ch. 3, upon which the plaintiff in his replication particularly relies, being that the power and authority of any arbitrator appointed by any submission to reference, containing an agreement that such submission shall be made a rule of court, shall not be revocable by any party to such reference, without the leave of the court, or by leave of a judge ; and the arbitrator shall, and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make an award, although the person making such revocation shall not afterwards attend the reference, and the enactment contained in the ninety-seventh section of the Common Law Procedure Act, 1856, applying that section to the present case, shew that the defendant by his rejoinder confesses the cause of action and matters in the plaintiff's declaration and replication contained, without avoiding the same.

Joinder in demurrer.

Martin for the demurrer. *Start contra.*

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff is entitled to judgment on demurrer, for not only is the defendant's rejoinder bad, which is demurred to, but his plea was also insufficient.

The defendant is sued upon a bond, by which he bound himself to submit to the award of certain arbitrators. The plaintiff shews an award made, and charges as a breach that the defendant had not performed the award.

The defendant pleads as a defence that he revoked the submission. If he revoked, or attempted to revoke it, otherwise than by an instrument under seal, that, according to the current of authority, would be an ineffectual revocation, and he does not state that he did revoke by an instrument under seal.

Besides, if the defendant could have pleaded, and had pleaded a revocation which would have been effectual, that revocation would in itself have been a breach of the condition, by which the defendant bound himself to abide by the award, and the plaintiff would have a good right of action upon the bond, in consequence of that breach of condition.

The plea being bad, it is unnecessary to go into a consideration of the later proceedings.

It is well, however, to notice that when we take into view the 29th clause of 7 W. IV., ch. 3, and the 97th clause of the Common Law Procedure Act of 1856, it is evident that the latter of the two does not in terms provide for restraining the power of revocation in those cases where the submission contains no consent that it may be made a rule of court, though by putting such submission substantially on the same footing as those which do contain the consent, provided it is not expressed in them that the submission shall not be made a rule of court, the legislature has, as it may reasonably be contended, enabled us to hold that there is no difference between the two, in regard to the prohibition against revoking without authority of a court.

Judgment for plaintiff on demurrer.

RUTTAN V. LEVISCONTE.

Sale of Lands—Mortgage for purchase money—Effect of judgments and executions against the purchaser—Lands acquired after fi. fa. issued.

Where lands are conveyed to a purchaser, against whom judgments are then registered, and executions against lands in the sheriff's hands, and a mortgage is taken back on the same day for a balance of purchase money, the judgments and executions attach before the mortgage.

Per Burns, J.—Lands acquired while the writ is in the sheriff's hands may be sold under it, if properly advertised, though they have not been twelve months owned by the debtor.

This was an action of ejectment, in which a verdict was taken for the plaintiff, subject to the opinion of the court, on the following facts :—

The plaintiff sold to the late Benjamin Dougall all the undivided fourth part, and the undivided fifth part of another fourth part, of all and singular the tract of land now in the town of Belleville, composed of lot No. 6 in the first concession of the township of Thurlow, and the broken front thereof, for £1,000, payable as follows: that is to say, £250 down, and the remaining £750 in five annual instalments of £150 each, with interest, to be secured on the premises by mortgage.

The deed from plaintiff to Dougall was executed at Kingston, and Mrs. Dougall was to sign the mortgage. Mr. Dougall brought the mortgage from Kingston to Belleville, and executed it with her at Belleville. The deed is dated the 25th day of June, 1853, and is registered the 5th day of July, in the year 1853, at half-past two, P. M.

The mortgage is dated the 25th day of June, in the year 1853, and is registered the 5th day of July, 1853, at half-past one, P. M.

The defendant claims title to the premises under a deed poll from the sheriff of Hastings, dated the 18th of May, 1854, and registered on the 26th of May, 1854, under writs against the lands of Benjamin Dougall. Under a deed of quit claim, executed by Benjamin Dougall and his wife to the defendant, dated the 21st of August, 1856, and registered on the 19th of March, 1857. Under a deed of bargain and sale, dated the 22nd of August, 1856, and registered on the 18th of November, 1856, from the

defendant to Albert Lewis Smith, of all his interest in the premises. Under a deed of bargain and sale, dated the 15th of September, 1856, and registered on the 18th of November, 1856, from Albert Lewis Smith to Charles George Levisconte, by which Smith conveys to the defendant 63 village lots, giving the numbers as shewn in a plan registered on the 9th day of September, 1856, and being part of lot No. 6 and the broken front aforesaid. Under an indenture of mortgage from the defendant to Smith of the lots last mentioned, with the proviso "That every thing, in it contained shall be absolutely void, if the defendant did within two years from the date thereof, pay off, discharge, and have discharged from the books of the registry office of the county of Hastings, all judgments forming any lien or charge on lot No. 6, in the first concession of the township of Thurlow, which are or appear in the said registry office against the defendant, Benjamin Dougall, or Peter Ruttan, and shall within the said time pay off and have discharged in the said office a mortgage by Benjamin Dougall to the plaintiff (on which this action is brought.)

The judgments and writs against Dougall, as appears by the books in the sheriff's and registrar's offices, and under which the sale took place, are as follows:—

In an action between Henry Eccles and Benjamin Dougall, under a *fieri facias* against Dougall's lands, delivered to the sheriff of the county of Hastings on the 5th day of August, 1852; and also in an action between the Marmora Foundry Company and the same defendant, by virtue of a writ of *alias fieri facias* against the lands also delivered to the said sheriff on the 16th of September, 1853; also in an action between the Law Society of Upper Canada and the same defendant, by virtue of a writ of *fieri facias de ter'is* against the said defendant Dougall, delivered to the sheriff aforesaid, on the 9th day of September, 1852, were seized and sold at public sheriff's sale the interest the said defendant had in part of lot No. 6 in the first concession of the township of Thurlow, after being duly advertised by the said sheriff, to Charles George Levisconte, the defendant in this suit, at the price of £450, as the highest bidder for

the said lands, and a sheriff's deed of the said defendant Dougall's interest in the said land was duly executed and delivered to the said Charles George Levisconte.

In each of the said three suits against the said Dougall was registered a certificate of judgment in the office of the county of Hastings. In the suit "*Eccles v. Dougall*, it was registered on the 10th of October, 1853; in the suit, *The Marmora Foundry Company v. Dougall*, on the 15th of March, 1851; in the suit, *The Law Society of Upper Canada v. Dougall*," on the 20th of August, in the year 1852.

M. R. Vankoughnet, for defendant, cited *Potts v. Meyers*, 14 U. C. R. 499.

Smith, Q. C., contra.

ROBINSON, C. J.—It appears that the real estate in question was sold to Levisconte by the sheriff under executions which issued upon judgments that had been entered and registered before the late Benjamin Dougall received a conveyance of the estate from the plaintiff, and were still in force when that conveyance was executed.

The only question therefore is whether, as Dougall, on the same day that he took the title,—though, as we must infer from the statement, some hours afterwards,—gave back a mortgage to the plaintiff, the grantor, on the same estate, to secure £750, the unpaid portion of the purchase money, (£250 having been paid down), he should be held to have been so seized of the estate as that the judgments then in force attached upon it.

I think the law would not in this case regard the fraction of the day that intervened between the execution of the deed to Dougall and his giving back the mortgage, and that the effect would be the same as if all had been done at one sitting.

Even so, however, the judgment of this court, in *Potts v. Meyers* (14 U. C. R. 499), in which I had the misfortune to differ from my brothers, must govern us, as I understand my brothers to adhere to that decision; and the judgment of the court is therefore that a verdict be entered for the defendant.

BURNS, J.—It does not appear to me that the registration of the three judgments mentioned in the case affect the plaintiff's title as mortgagee in any way. One of them appears to have been registered some time after the plaintiff registered his mortgage, namely, on the 10th day of October, 1853, and the other two as follows, one on the 15th of March, 1851, and the other on the 20th day of August, 1852, but the registration of itself confers no title.

The plaintiff's mortgage is dated the 25th of June, 1853, and registered on the 5th of July, 1853, and one of the writs of *fi. fa.* against lands was placed in the sheriff's hands on the 16th day of September, 1853, and of course the writ cannot touch the plaintiff's title as mortgagee in any way, and any sale the sheriff made to satisfy that writ must be void. The other two writs being placed in the sheriff's hands, as follows, viz., the first on the 5th of August, 1852, and the other on the 9th of September, 1852, the question is whether the lands acquired by the judgment debtor by the conveyance to him of the 25th of June, 1853, were liable to seizure and sale on the 24th of May, 1854.

Two questions present themselves. 1. Whether land purchased by the judgment debtor during the currency of a writ against his lands, but for which land, instead of paying the purchase money in full, he pays a part, and to secure the remainder he executes a mortgage upon the same lands some hours after he has received the conveyance to himself in fee, are liable to the writs of execution in the hands of the sheriff at the time of purchase. 2. Whether the sheriff can sell lands which are acquired after the writ placed in his hands, within twelve months from the time when the lands would be liable to seizure.

With regard to the first question, I must say I think by the plaintiff executing a conveyance transferring the legal title to the judgment debtor, he subjected the property to the legal effect of the executions then in the sheriff's hands, and I do not think he acquired back the legal title by means of the mortgage shortly after executed to him, so that it would exclude the writs attaching in the mean time. This, however, is merely in a legal point of view, and there really

is very little use, as it appears to me, in our being asked to consider a question in this court which can be of no practical use to the parties, for without doubt the plaintiff would have a good remedy in equity to charge the estate by way of lien for the remainder of the unpaid purchase money, to the exclusion of the judgment creditors.

The second question is one of importance as a matter of practice on *fi. fas.* against lands. The second section of 43 Geo. III., ch. 1, enacts, "that the writ against lands and tenements shall not be made returnable in less than twelve months from the teste thereof, nor shall the sheriff expose the same to sale within less than twelve months from the day on which the writ shall have been delivered to him." Does this mean that lands liable to be sold upon a writ must be lands in the hands of an execution debtor at the time the writ is placed in the hands of the sheriff, or does it mean that lands acquired subsequently may be sold immediately after the expiration of the twelve months, provided the sheriff has advertised the lands the required time; or does it mean this—that although the land would be liable to seizure during the currency of the writ, yet the sheriff must hold the writ over it for twelve months before he could sell? The first writ of *fi. fa.* would expire on the 5th of August, 1853, and the other on the 9th of September, 1853. The twelve months from the time the debtor acquired the land would expire on the 25th of June, 1854. The sale was made on the 24th of May, 1854. The best construction I can put upon the act is, that the writ being returnable at the distance of more than twelve months from the teste thereof, and the sale not being less than twelve months from the time of the delivery to the sheriff, provided the necessary advertisements be given as directed by 2 Geo. IV., ch. 1, sec. 20, is correct, and the land liable. No question is made with respect to any irregularity in respect of notices, but what appears is, that the lands in question first became liable to the execution the 25th of June, 1853, and were sold on the 24th of May, 1854; and the point is whether, though the writ be right as to its return, and the time which it should lie in the sheriff's office had expired, was such sale, being within twelve

months from acquiring the title, a proper sale of the lands. The owner does not complain, but a person who claims the lands does complain. Many years ago this court held that it was not necessary that an alias writ of *fi. fa.* against lands should be made returnable at a period of more than twelve months from its being issued, or that it should be in the sheriff's office more than twelve months. *Nickall v. Crawford* (Tay. Rep. 376.) The effect of that decision necessarily is, that it was not necessary that the title which the sheriff was to expose for sale under the writ, must be subject to the same writ of execution upon which the sale was to be effected for a period of twelve months.

The judgment should, therefore, be in favour of the defendant.

MCLEAN, J., concurred.

Judgment for defendant.

THE MUNICIPALITY OF THE TOWNSHIP OF LONDON V. THE GREAT WESTERN RAILWAY COMPANY.

Great Western Railway—Action against for taxes—Pleading—Want of Notice
16 Vic., ch. 182, secs. 8, 21.

The declaration stated that a tax, amounting to £128, was duly assessed against the defendants for the year 1856, of which they had due notice, yet defendants, although said sum had been duly demanded of them, refused to pay the same.

Defendants, as to £6 15s. 5d., pleaded payment into court, and except as to that sum, that the assessors for the year did not deliver, or transmit by post to any station or office of defendants, a notice of the total amount at which they had assessed defendant's real property in the municipality, distinguishing the value of the land occupied by the road and the value of all defendant's other real property.

Held, a good defence.

The declaration alleged that a tax, amounting to £128 12s. 11d., was duly assessed against the defendants in and for the township of London, for the year 1856, of which the defendant had due notice, yet the defendants, although the said sum of £128 12s. 11d. had been duly demanded of them, had refused or neglected to pay the same, whereby an action has accrued to the plaintiffs to recover the said sum so assessed against the defendants as aforesaid, with interest thereon, as a debt due to the said township of London, which the municipal council of the said township of London,

being the plaintiffs in this cause, were entitled to recover, with interest; and the plaintiffs claimed the said sum of £128 12s. 11d., with interest thereon, amounting to £8, making the aggregate sum of £136 12s. 11d., which the plaintiffs claimed.

Pleas.—1. Except as to the sum of £6 15s. 5d., parcel, &c., that the defendants never were indebted as alleged.

2. Except as to the sum of £6 15s. 5d., parcel, &c., that the assessor or assessors for the said municipality of the plaintiffs, for the year 1856, did not deliver, or transmit by post to any station or office of the defendants, a notice of the total amount at which they had assessed the real property of the defendants in the said municipality, distinguishing the value of the land occupied by the road, and the value of all other property of the Company.

3. As to the sum of £6 15s. 5d., payment into court.

The plaintiffs demurred to the second plea, assigning as grounds, that it is not stated that the defendants duly transmitted, for the year 1856, a statement to the clerk of the plaintiffs, describing the value of all the real property of the plaintiffs, other than the roadway, and also the actual value of the land occupied by the road in the said municipality of the township of London, according to the average value of land in the locality; and also that the defendants do not deny that they, the defendants, were notified by the assessor or assessors of the assessment in the declaration mentioned they only deny having been notified by the said assessor or assessors in a particular manner, and accordingly the defendants should have applied for revision of their assessment, and are not entitled now to set up the defence in the said plea set forth. And also because the said defendants, by the payment of the sum of £6 15s. 5d. into court, admit their liability to pay the plaintiffs some amount, and such being the case, that amount, it is submitted, can only be determined by the assessor's roll of the said municipality for the year 1856, as finally passed. And that the said plea, if it is a good plea at all, is a plea in bar of the plaintiffs' action, whereas the defendants, by payment into court as aforesaid, admit a *prima facie* cause of action on behalf of

the plaintiffs, and seek to reduce the amount of their claim only. And also that the plaintiffs in their declaration aver due notice to the defendants of the said assessment for the year 1856, which the defendants do not deny in the said plea, their said plea being a plea neither in bar nor in confession and avoidance.

Elliott for the demurrer. *Irving* contra.

The clauses of the statute cited are referred to in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

In order to entitle a municipality to sue for a tax imposed in the ordinary manner upon resident ratepayers (and by the 8th clause of the Assessment Law, 16 Vic., ch. 182 Railway Companies are always to be assessed for their real estate as if they were resident) they must, we think, be able to shew that they have done what would be necessary to entitle them to distrain by warrant for the same tax, if the party had goods that might be seized, except perhaps that there would be no occasion for making the previous demand mentioned in the 42nd clause.

And neither by distress, nor by the action under the 45th clause, can a ratepayer, we think, be compelled to pay a tax of which such notice has not been given to him as the law has provided, in order to give him the opportunity to appeal under the 26th and subsequent clauses. We do not mean to say that the plaintiffs in such an action are bound to set forth in their declaration that they have given such notice as the law requires before the assessment roll was finally completed—that may perhaps be assumed till the contrary is shewn—but it must be open to the defendant to deny that such notice was given, and to put the plaintiffs to the proof of it.

The plaintiffs have averred in their declaration that a tax of £128 12s. 11d. was *duly assessed* against the defendants for the year 1856, of *which the defendants had notice*. That does not necessarily mean more than that some time before the action was brought, and for all that appears after the assessment roll had been completed, and the time for

appeal had passed, the defendants had due notice that such a tax was assessed against them. But whatever it may have meant, the defendants have in their plea denied that the assessors for 1856 did that which the twenty-first clause of the act makes it their duty to do in case of all railway companies, *i. e.*, "deliver at, or transmit by post to any station or office of the company, a notice of the total amount at which they have assessed the real property of the company in their municipality or ward, distinguishing the value of the land occupied by the road, and the value of all other real property of the Company."

If the plaintiffs have not done so, they are not in a position to sue for the tax. And the 21st clause makes it clear, by its reference to the 23rd clause, that the notice which is to be thus given must be given before the completion of the roll. It would otherwise be of little use to the party.

Unless the due notice mentioned in the declaration must be taken to mean such a notice, it would be an averment of no consequence. If it does mean that, then the defendants of course are at liberty to traverse it, as they have done in their plea.

The plaintiffs object that the defendants should have shewn in their plea that they did what the same 21st clause makes it incumbent on them to do—namely, that they had some time in the year transmitted to the clerk of the municipality such a statement of their real property in the municipality, and *its value*, as that clause of the act requires.

We suppose that information is called for in order to facilitate the business of the assessors, though it can hardly be meant to be binding upon them either as to quantity or value; and no doubt it ought to have been sent, and perhaps may have been; but admitting that we should infer that it was not sent, since the defendants have not stated it, still that could not authorise the assessors or the municipality to impose any amount they chose, and enforce it without having given notice of the amount required by law in time to allow of an appeal.

We do not think, therefore, that the plea is bad for not containing the averment suggested.

The plaintiffs have further objected to the plea, that by submitting to a sum of £6 15s. 5d. as due for the year 1856, the defendants have admitted a rate legally made, and so cannot set up a want of notice; but upon consideration it is plain there is no force in that objection, because if the Company have received a notice of £6 15s. 5d. as being the rate, and afterwards found that £128 was demanded of them, they could only plead, as they have done, that the plaintiffs had not transmitted to them a notice of the total amount at which they had assessed their property.

In our opinion the plea is sufficient, but the plaintiffs may apply for leave to take issue upon it, or reply to it specially.

Judgment for defendants on demurrer.

MORLEY, ADMINISTRATRIX OF MORLEY, v. THE GREAT
WESTERN RAILWAY COMPANY.

New trial granted for excessive damages, in an action brought by an administratrix, under 10 & 11 Vic., ch. 6, to recover damages for the death of the intestate, caused by a railway accident.

This was an action under the statute 10 & 11 Vic., ch. 6, by the plaintiff, as administratrix of John Morley, on behalf of his widow and five children, which children were of different ages, from one month to twelve years, brought to recover compensation for the loss of his life by the railway accident on the Desjardins Canal bridge, in March, 1857.

The defendants allowed judgment to go by default, and damages were assessed at Merriittsville, before *McLean, J.*, at £5,000, to be distributed £500 to his widow, and the rest in equal sums among his infant children.

It appeared that the deceased was a blacksmith by trade, and had invented an improved plough, for which he obtained a patent, and since his death his widow had obtained a patent for another improvement in ploughs made by him.

He was about thirty-five years of age, a healthy man, likely to live many years, careful and industrious. It was sworn that he had for the last year or two sold about four or five hundred ploughs, on each of which he made a profit of about six dollars, whether above all expenses of disposing

of them was not explained. He had realised a small property, and was, in the opinion of several witnesses, likely to have accumulated wealth, from his attention to business, his ability to invent, and his good character.

Cameron, Q. C., obtained a rule *nisi* for a new trial, on the ground that the damages were excessive.

Freeman, Q. C., shewed cause, and cited *Smith v. Woodfine*, 1 C. B. (N. S.) 660; *Theobald v. The Railway Passengers' Assurance Company*, 18 Jur. 583.

ROBINSON, C. J., delivered the judgment of the court.

The patents which the deceased had obtained for an improved plough would of course continue to benefit his family, by such use as his representatives might make of them.

The learned judge who tried this cause is of opinion that the verdict is outrageously excessive in point of amount, and should not be allowed to stand. We confess, though we are reluctant to interfere in such cases, where, so far as we can see, neither the court nor jury have any standard very precise or satisfactory, by which they can measure the damages, yet we think we should ill discharge our duty if we did not provide for this case undergoing the consideration of another jury.

We shall say nothing more upon it at present, as the case will have to be again tried.

We observe that in a very late case in England, of *Franklin v. South Eastern Railway Company* (31 L. T. Rep. 154) the Court of Exchequer, where they admitted that the plaintiff had a claim to compensation under the act, granted a new trial, because they thought the damages excessive, under the circumstances, though the verdict was for £75 only. We refer also to *Dalton v. South Eastern Railway Company*, in the Common Pleas (31 L. T. Rep. 152), in which the court also struck out damages which were excessive, and approved of the decision of the court in *Franklin v. The same defendants*.

Rule absolute, on payment of costs.

HUGO V. THE GREAT WESTERN RAILWAY COMPANY.

Covenant to maintain crossings—Actions thereon—Lease of the land by plaintiff—Pleadings.

To an action on a special agreement for not maintaining proper crossings for the plaintiff, whose lands had been separated by the railway, and for not keeping up the cattle guards and fences connected with such crossings, defendants pleaded that the agreement was executed by them for the benefit of the plaintiff, his executors, administrators, and assigns, for the time being the occupants of said land, and that during the whole continuance of the grievances complained of, one J. T. and others, were possessed to their own use, and to the exclusion of the plaintiff, of said land on each side of the railway, for divers terms of years, under leases executed by the plaintiff before the commencement of said grievances.

Held, no defence.

The first count of the declaration charged, in substance, that by certain articles of agreement made between the defendants and the plaintiff—after reciting that the defendants, in the construction of their road, had taken a portion of the lands of the plaintiff, being, &c., and that the said road so crossed the lots as to separate the land, leaving portions thereof on each side of the same, and that the Company would, among other things, build and put up a good and sufficient bridge, crossing, or passage-way under the said railroad, and make proper and sufficient fences on each side of the line of the route of their railroad, and keep up the said fences—the said defendants did covenant and agree to and with the plaintiff, that they would build a good and sufficient bridge, crossing, or passage-way under the said railroad, at or near the present farm road, and that they would put up good and sufficient fences, and would maintain the same during the continuance of the said corporation, the said crossing or passage-way to be so constructed and formed as would afford the said plaintiff all reasonable convenience and accommodation for teams and waggons, loaded and unloaded, to pass and repass the same; yet that, although defendants afterwards constructed their road across said lots and built the crossing, they did not maintain the same so as to be of reasonable convenience for teams, &c., to pass and repass the same; and although the defendants put up fences along each side of the line of their said railroad, yet they did not build good and sufficient fences, nor maintain the same, according to their said covenant.

The second count alleges, that by virtue of certain other articles of agreement between the defendants and plaintiff,

the defendants did covenant to maintain in good and sufficient manner two surface crossings and their approaches, then lately made over their said railway, for the use of the said plaintiff's said farm, and also that they would keep up and maintain in a good and sufficient manner the cattle-guards, gates and fences connected with the said crossings, yet that they had not kept and maintained in a good and sufficient manner the said surface crossings and their approaches, nor the cattle-guards, gates, and fences connected with the said crossings, according to their said covenant.

Defendants pleaded that the said respective articles of agreement, in the said first and second counts respectively mentioned, were, and purported to be executed by the defendants for the benefit of the plaintiff, his executors, administrators and assigns, for the time being the occupants of the said lots of land in the said articles of agreement respectively mentioned, and that, during the whole continuance of the said grievances in the said first and second counts of the plaintiff's declaration respectively mentioned, one John Taylor, and other persons, respectively, were respectively possessed to the use of themselves, the said John Taylor and such other persons, and of their respective executors, administrators and assigns, and to the exclusion of the plaintiff, of the whole of those parts of the said lots of land in the plaintiff's declaration mentioned which lie on each side of the defendants' railroad, for divers terms of years, by virtue of divers deeds of demise by the said plaintiff before the commencement of the said grievances duly made and executed.

The plaintiff demurred to this plea, as being no answer to his right to recover.

R. A. Harrison for the demurrer.

Gwynne, Q. C., contra, cited *Spencer's case*, 1 Sm. Lea. cas. 22.

ROBINSON, C. J., delivered the judgment of the court.

This plea in our opinion is no defence to the action. Though this may be a covenant running with the land, being for the erection and maintenance of fences and a bridge, which would benefit the occupant of the estate, yet it would only

run in favour of the assignee of the same estate or interest which was in the covenantee; in other words, the assignee of the fee. (Addison on Contracts, 972.)

Taylor, according to the plea, was only assignee of a term of years, and even that, for all that appears, may have expired before this action was brought.

Judgment for plaintiff on demurrer.

HARVEY V. WALLACE.

Pleading—False representation—Scienter.

The plaintiff declared that defendant—by falsely pretending and representing to the plaintiff, that if the plaintiff would go with his vessel to Willie's bay, for the purpose of carrying a load of defendant's wood thence to Cobourg, he would be able, by reason of the depth of water in said bay, to approach within a convenient distance from the shore, and load the wood on his vessel with scows—induced the plaintiff to go with his vessel to the said bay for that purpose, and to incur great expense, &c., whereas the depth of water was not sufficient, &c.

Held, on motion in arrest of judgment, 1. That the declaration was sufficient, without averring that defendant knew of the want of water. 2 That it sufficiently appeared that defendant induced the plaintiff to go for the wood by his false representation, though no contract to carry was stated.

This was a Division Court suit removed into this court by *certiorari*.

The plaintiff declared, for that the defendant—in consideration that the plaintiff would go with his vessel to Willie's Bay, and would carry on the said vessel, for reward, from Willie's Bay to Cobourg, a cargo of wood of defendant's, lying on the shore of said bay—undertook and promised that there would be, when the plaintiff's vessel should arrive at the said bay, a sufficient depth of water in the said bay to enable the plaintiff to take his said vessel within a convenient distance of that part of the shore where the said wood was lying, and also to enable the plaintiff to load the said wood on scows at the shore, and take the scows so laden to the said vessel: that the plaintiff went with his vessel to Willie's Bay, for the purpose of carrying the said wood therefrom to Cobourg, and was ready and willing so to do, but that there was not a sufficient depth of water in the said bay to enable the plaintiff to bring his said vessel within a convenient distance of the said shore, or to load the said wood, &c., (as

above) by reason whereof the plaintiff was prevented from receiving the wood, and was put to great loss and expense, &c., &c.

In a second count, the plaintiff complained that the defendant—by falsely pretending and representing to the plaintiff that if the plaintiff would go with his vessel to Willie's Bay for the purpose of carrying the wood (as in the other count) the plaintiff would be able, by reason of the depth of water in the said bay, to approach with his vessel to a convenient distance from the shore, where the wood was lying, and would be able to approach the shore with scows, and load the scows with the said wood, and take the same to his vessel—induced the plaintiff to go with his vessel to Willie's Bay for the purpose, &c., and to incur great expense in hiring and paying men to work the said vessel, &c., whereas the depth of water in the said bay was not sufficient for the said purpose. A common count was added for work and labour.

Pleas: 1. Non-assumpsit, to the first count. 2. To the first count, that there was a sufficient depth of water in the bay to enable the plaintiff to take his vessel, &c. (following the declaration). 3. To the second count, not guilty. 4. To the same count, that the plaintiff could have approached with scows, and loaded them with wood, &c., (following the declaration). 5. To the common count, not indebted.

The plaintiff took issue on the pleas.

At the trial a general verdict was given for the plaintiff for £6.

Cameron, Q. C., obtained a rule *nisi* to arrest the judgment. He cited *Fowler v. Benjamin*, 16 U. C. R. 174.

C. S. Patterson shewed cause, and cited *Evans v. Collins*, 3 Q. B. 78, *note*; *Taylor v. Ashton*, 11 M. & W. 401; *Randell v. Trimen*, 25 L. J. (C. P.) 307; *Clapham v. Shillito*, 1 Beav. 146.

ROBINSON, C. J., delivered the judgment of the court.

Upon the argument the defendant's counsel objected only to the sufficiency of the second count.

As to the want of a scienter: this we must consider, is not the case of an alleged false representation respecting the

character and circumstances of a third party, or on any occasion in which the interests of the person making the representation were not concerned. The count objected to gives us sufficiently to understand that the defendant desired the plaintiff to take his schooner into Willie's Bay, and bring from thence to the defendant a quantity of wood, stated by the defendant to be lying upon the shore of the bay.

It would naturally suggest itself to the plaintiff that it was necessary to know whether his vessel could be brought near enough to the shore to admit of his taking in the wood with reasonable convenience, and as the defendant may be supposed to know on what part of the shore of the bay his wood was lying, the plaintiff would, as we may suppose, enquire of the defendant what the fact was in that respect. If he did so enquire, it then became the duty of the defendant not only to make no statement on that point which he knew to be false, but it was his duty also to be careful that he did not mislead the plaintiff, by taking upon himself to make such a statement as he did not know to be true. In other words, he was not at liberty, in the position in which he stood, to make a statement at random, and thereby induce the plaintiff to go up with his vessel, relying on the knowledge which he would naturally suppose the defendant must have, as to the nature of the shore and the facility of loading the wood into a vessel at that particular point. The harm to the plaintiff was the same if the defendant misled him by pretending to know what he did not know, as if he had misled him by falsely stating that to be true which he knew to be false; and a material point is, that the representation was made in order to induce the plaintiff to undertake a service for the defendant's benefit. What might have been the case if it had appeared upon the trial that the defendant had done his best to inform himself, and honestly stated what he believed to be true, we need not now inquire. This is after verdict, and we cannot assume that the defendant had such an excuse to shew. He is found guilty of falsely representing, &c.

It is sufficiently averred, we think, in substance, that by such false representation the defendant induced the plaintiff to take his vessel to Willie's Bay, to bring down wood for

the defendant, though it is not stated in terms that any special contract was made between the parties for the carrying the wood. The declaration is not so carefully framed as to leave no ground for special demurrer, but we think after verdict we can sufficiently gather from it that the plaintiff was induced by the defendant to take his vessel to the bay for the wood; in other words, took it there at his request, on his service, and on his assurance; and not finding the depth of water to be such as the defendant had represented it to be, he was thereby disappointed, and put to considerable loss from not being able to approach the shore, and load the wood conveniently.

In our opinion the rule should be discharged.

Rule discharged.

HUMPHRIES V. BURTON.

Dower—Evidence of assignment.

Held, that upon the evidence in this case, stated below, the jury were justified in finding that the tenant had assigned dower before action brought.

PLEAS, 1. *Tout temps prist*. 2. An assignment of dower before action. A demand of dower was served on the 17th of September, 1856, and this action was brought on the 18th of May, 1857.

The jury found for the tenant.

C. S. Patterson moved for a new trial, on the evidence.

Wallbridge, Q. C., shewed cause.

The facts of the case are fully stated in the judgment.

ROBINSON, C. J.—The costs only are at stake, for the plea of *tout temps prist* admits the right to dower, except, indeed, that the issue on the second plea being found for the tenant, it is established by the record that the widow has had her dower assigned to her, and it would be inconsistent that she should have judgment notwithstanding for her dower, as if no such issue had been found in her favour.

The evidence left it doubtful whether the tenant, when he offered to give up to the widow one-third part of the house

and lot, had not annexed a condition that she must occupy in person. That of course could not be treated as an offer to do what the law requires, but the case seems to have gone fairly to the jury, and they found that what had been done amounted to an actual assignment of dower. We do not think we can say on the evidence that the finding was wrong, for it was proved that the tenant, to the satisfaction of the agent who on the demandant's behalf demanded dower, set off one-third of the land, and a portion of the house, and declared his willingness that she should occupy accordingly, and gave to the agent the key of her part of the house, which was given to the defendant. If the jury had been convinced that the tenant insisted on the widow occupying in person, that, or any other condition being annexed to the assignment, would have made it a void act. It did not require any more formal assignment by deed or otherwise than seems to have taken place here. If the demandant, therefore, desires to enter into possession of the portion of the land and house which it was sworn was allotted to her, and finds her right denied, or her occupation by herself or her tenant obstructed, she will have her remedy for a new assignment, in consequence of such eviction.

The premises are of small value, and the husband had alienated the land before he died, which makes the case a hard one. The tenant seems to have shewn a disposition to do without an action whatever could be legally and fairly demanded of him, and we are of opinion that we should not interfere. It certainly does not seem to be a case in which the demandant had any reason to expect her costs. We therefore do not interfere, but discharge the rule.

MCLEAN, J.—This action was brought to recover dower in a village lot in the village of Percy, which had been alienated by Israel Humphries, the demandant's husband, before any buildings were erected on it.

It appeared in evidence that when dower was demanded in the premises the tenant expressed his readiness to assign dower, and that he and the demandant's agent actually measured certain portions of the house and ground to be

enjoyed by the demandant as her dower, and her agent received and took away a key of a room which was assigned as a part of the dower. For the portion thus assigned to the demandant the tenant offered her agent to pay a rent of £3 per annum, but he asked £5. Subsequently he informed the tenant that the demandant would take the rent which had been offered; but the tenant then declined to give it, and said the demandant might occupy the premises herself, and urged that she would have to put up partitions to separate her portion from the other part of the house, and that she would personally have to occupy the premises. There was, however, no condition attached to the assignment of dower when it was made, whatever may have been the expectation as to its occupancy, and there was no evidence that the tenant at any time refused to let the demandant into possession, or any one claiming under her; but if he had done so, that would be an interruption in the enjoyment of the dower which could not interfere with his plea of dower assigned. For such an interruption the demandant would have a remedy at law, but she cannot, after dower has been actually assigned, sue for what she has received. The jury have, after hearing the evidence, found for the tenant.

The right of demandant to dower being admitted on the pleadings, she can enforce her right at any time hereafter, should the tenant attempt to withdraw from the arrangement heretofore made; but the dower being demanded in a house erected by the tenant with his own means, and the case being for a hard and rigid enforcement of a strict legal right, and this application involving only a question of costs, the circumstances are not such as to require any interference with the verdict of the jury, merely to afford another opportunity for the demandant to recover costs, which by the verdict of the jury appear to have been unnecessarily incurred.

BURNS, J., concurred.

Rule discharged.

FRAZER V. WRIGHT.

Covenant to teach and board—Liability of heir thereon.

The plaintiff declared against defendant, as heir of W., upon an indenture by which he alleged that W. in her life-time covenanted with the plaintiff to teach and find board and lodging for her during a specified period, and that in the event of her death, her heirs, executors, and administrators, should perform the covenant.

Held bad, for 1. By the form of the covenant the heir was not bound ; and 2. Upon such a contract, being one of apprenticeship, he could not be made liable.

DECLARATION, for that whereas Rachel Wright in her life-time, whose heir the defendant is, to wit, on the 11th of March, 1848, by her certain indenture and agreement in writing, sealed with her seal, and now shewn to the court here, covenanted and agreed to and with the said Elizabeth Frazer, that she would teach and instruct her, or cause her to be taught and instructed, to read and write, and that she would find or cause to be found for her, the said Elizabeth Frazer, meat, drink, washing, lodging and clothing, and all other necessaries fit and convenient for the said Elizabeth Frazer, the plaintiff, from the said 11th of March, 1848, until the 24th of May, 1860. And the plaintiff avers that the said Rachel Wright, by the said indenture or agreement covenanted, that in the event of her death, then that her heirs, executors and administrators, should teach and instruct the plaintiff, or cause her to be taught and instructed to read and write, and find or cause to be found for her, the plaintiff, meat, drink, washing, lodging and clothing, and all other necessaries fit and convenient for her, the plaintiff's support and maintenance for and during the said period. And the plaintiff avers that the said Rachel Wright, on the 2nd of February, 1850, died intestate, and seized of lands and tenements in Upper Canada, which the defendant inherited as such heir at law, and who immediately after the death of the said Rachel Wright acquired the said lands and tenements as his own property by inheritance as aforesaid, and from thence and is still possessed and owner of the same ; and the plaintiff avers that the defendant is the heir at law of the said Rachel Wright. And the defendant, since the death of the said Rachel Wright, has not taught

and instructed the plaintiff to read and write, nor found, nor caused to be found for her, the plaintiff, meat, drink, washing, lodging and clothing, and all other necessities fit and convenient for the plaintiff, according to the said indenture and agreement, nor any part thereof; and the defendant, since the death of the said Rachel Wright, has hitherto wholly refused, and still doth refuse to teach and instruct the said plaintiff to read and write, or to cause her to be taught and instructed, or to find or cause to be found for her, the plaintiff, meat, drink, washing, lodging and clothing, and all other necessities fit and convenient for the said plaintiff, according to the said indenture and agreement, and wholly refuses so to do.

Demurrer—The material objections taken were, that the defendant being heir at law, is not bound as such on any covenant of his ancestor. That as the defendant is not expressly named in the said covenant of the said Rachel Wright, upon which the breach in the declaration is assigned, he is not liable on the same.

S. Richards, for the demurrer, cited Co. Lit. 209 *a*; Wms. on Exrs. 4th Ed. 1467; Com. Dig. "Pleader," E. 2; Bac. Abr. "Heir and Ancestor."

McIntyre, contra, cited Wilson v. Knubley, 7 East 130; Farley v. Briant, 5 N. & M. 46; Sickles v. Asselstine, 10 U. C. R. 203; Vankoughnet v. Ross, 7 U. C. R. 248; Bl. Com. II., 243.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the defendant is entitled to judgment on this demurrer.

In the first place, the covenantor did not bind her heirs—that is, did not covenant for her heirs—she only bound herself that in the event of her death, her heirs, executors, &c., should teach and instruct the plaintiff, and find and provide her necessities, &c.

In the next place, this is an indenture of apprenticeship, though not in any particular trade or craft. It contemplates service to be rendered, and instruction and board, &c., concurrent with such service. Rachel Wright could not impose

upon the heir, or upon any one, the duty of teaching the plaintiff, or of maintaining her.

There is no question here about any charge upon the land of Rachel Wright for the support of the plaintiff, for there is no such charge created. The plaintiff sues for damages as if the defendant's ancestor could make him liable to answer in damages for not teaching and instructing, and supporting the plaintiff, but that we take to be a kind of liability which the heir could not be subjected to.

Such a contract as that sued upon must, we think, like other contracts of apprenticeship, be held to be dissolved by the death of either party. The heir cannot be bound to accept or teach the apprentice, nor would the apprentice be bound to go to the heir to be instructed, or to live with him.

There were other objections taken to the declaration, which we do not think it necessary to discuss.

Judgment for defendant on demurrer.

TODD V. CAIN, ET AL.

Deed—Estoppel—Want of seal to patent.

Held, confirming *Doe McGill v. Shea*, 2 U. C. R. 483, that the deed in this case, given by the grantee of the crown before the patent had issued, being similar to the deed in question there, could not operate by estoppel. The want of a seal to a patent when produced at the trial is not a fatal objection, if it is clear upon inspection that it has once been sealed.

EJECTMENT for lot 6, and the west half of lot 7, in the 5th concession of West Flamboro'.

At the trial, at Hamilton, before *Hagarty, J.*, the plaintiff claimed under the following chain of title:

1. A patent to Thomas Miller, dated 18th August, 1801. It was objected by defendant's counsel that there was no seal to this patent, and no evidence that it had ever been sealed.

2. A deed from Thomas Miller to William Dixon, dated 6th February, 1797, to which it was objected that Miller had then no right to convey, the patent not having yet issued, and that the conveyance, from the nature of it (being similar to that granted by the same person, and set out in the case

of Doe McGill v. Shea, 2 U. C. R. 483) could not operate by estoppel, as it contained no proper operative words, and shewed on the face of it that Miller did not profess to have a legal title.

3. A deed made on the 18th of June, 1802, by William Dickson to Isaac Todd.

4. By devise from Isaac Todd.

On the 21st of July, 1843, William Dickson had also conveyed to this plaintiff by way of confirming his title.

Various objections were taken to the proof of title from Isaac Todd, which it is unnecessary to mention, as the judgment does not proceed upon them.

The learned judge was inclined to consider some of the objections fatal. He thought that Miller's deed could not operate by estoppel, and he doubted whether the patent being without a seal could properly be received as proof of a patent, without some evidence to shew that it had once had a seal.

The plaintiff therefore accepted a nonsuit, with leave to move against it.

Crooks obtained a rule *nisi* accordingly. He cited Doe dem. Hennesy v. Myers, 2 O. S. 434; 2 Kay and Johns, 205; Crofts v. Middleton, 27 L. T. Rep. 114; Doe Starling v. Prince, 15 Jur. 632; Webb v. Austin, 7 M. & Gr. 701; 2 Sm. Lea. Cas. 513.

Read shewed cause, and cited Doe Irvine v. Webster, 2 U. C. R. 238; Doe McGill v. Shea, Ib. 483.

ROBINSON, C. J., delivered the judgment of the court.

The deed executed by Miller, in February, 1797, before any patent had issued for the lot, was of the same nature as the deed made by him about the same time to William Dickson, Esquire, of another lot of land in Flamboro, which is set forth in the statement of the case of Doe dem. McGill, v. Shea (2 U. C. R. 483); and in our opinion we must hold in this case, as we did in that, that such an instrument could not operate by way of estoppel, and for the reasons given in that case, and that Miller having in fact no legal interest at the time could convey none by the deed. The title there-

fore fails at the outset, and no confirmation attempted to be set up, under any deed given by Mr. Dickson after the patent had issued, could be of any service, unless he had in the meantime acquired a better title himself, which it does not appear he had.

We do not think the circumstance of the patent having no seal when produced would have been fatal, if the patent had issued before Miller made his deed to Dickson, for it was quite clear upon inspection that the patent had once been sealed, though the seal had been detached. Into the other objections it is not necessary to enter.

Rule discharged.

HOGLE V. HOGLE.

Slander—Perjury—Arrest of judgment.

Words imputing to the plaintiff the having taken a false oath, but not in any judicial proceeding, or on any occasion where it would be an offence in law, are not actionable.

But where the jury on such a charge gave £2 10s. damages, the court refused a new trial in order to give defendant his costs, but arrested the judgment.

The declaration charged that defendant falsely and maliciously spoke and published of the plaintiff the words following: "Stephen Hogle Hogle" (meaning the defendant) "was going to put David Hogle" (meaning the plaintiff) "through for taking a false oath."

And in another count, that defendant falsely and maliciously spoke the words following of the plaintiff: "David Hogle took a false oath, he" (meaning the defendant) "could prove it."

The declaration contained no explanation as to the occasion or proceeding in which the supposed false oath was charged to have been taken.

Plea, Not guilty.

At the trial at Belleville, before *Draper*, C. J., it appeared that defendant was uncle to the plaintiff. He had accused the plaintiff of having improperly possessed himself of a watch that had belonged to a relation of his who had died,

This was only in conversation with other persons ; the defendant had made no charge with a view to prosecution.

The plaintiff, in order to satisfy defendant, and relieve himself from the imputation, went voluntarily before a justice of the peace, and swore to an affidavit in which he stated that the watch was not the watch that belonged to his deceased uncle, but had been purchased by the plaintiff's father, at Toronto ; and denied that he had obtained, or had seen his uncle's watch. The plaintiff was sworn to this affidavit at his own request, and left it with the magistrate. The learned Chief Justice told the jury, that if they were satisfied that the words spoken related to this affidavit they did not impute the crime of perjury, and defendant should be acquitted. They found for the plaintiff, and £2 10s. damages.

Henderson, obtained a rule *nisi* for a new trial on the law and evidence, or to arrest the judgment. He cited *Holt v. Scholefield*, 6 T. R. 691 ; *Hall v. Weedon*, 8 D. & R. 140 ; *Hawkes v. Hawkey*, 8 East 431 ; *Rex v. Marsden*, 4 M. & S. 164 ; *Roberts v. Camden*, 9 East 93.

O'Hare shewed cause, and cited *Hoare v. Silverlock*, 12 Q. B. 630 ; 8 Scott, N. R. 9 ; *Griffiths v. Lewis*, 7 Q. B. 61 ; *Hunkinson v. Bilby*, 16 M. & W. 442 ; *Wakley v. Healey*, 18 L. J. (C. P.) 241 ; *Brown v. Smith*, 17 Jur. 807 ; C. L. P. A. 1856, sec. 110.

ROBINSON, C. J., delivered the judgment of the court.

As there was no room afforded by the evidence for surmising that the words spoken had reference to any thing else than the exculpating affidavit made before the justice of the peace, the defendant would seem to have been entitled to move to have the plaintiff nonsuited at the trial. To grant a new trial would be only leading to further costs and litigation to no purpose, so far as the plaintiff is concerned ; and as to the defendant, he stands on no favourable ground, certainly, for although the words which he spoke were not in themselves actionable, and were not shewn to have been spoken in relation to an occasion that would make them a legal slander, yet they conveyed a disgraceful imputation, for

which it does not appear that there were any ground. We shall not therefore grant a new trial, merely with a view to give him the costs, for the jury were properly directed, and the ends of justice will be better obtained by arresting the judgment, as we are moved to do. We have no doubt that the words as set forth in the declaration are not actionable, for the taking of a false oath is not an offence in law, unless it be in a judicial proceeding, or on some other lawful occasion on which it has been made an offence by law to swear falsely; and that the 110th clause of the Common Law Procedure Act does not help the plaintiff's case.

Rule absolute to arrest judgment.

CARROLL V. BERRYMAN ET AL.

Recognizance—Delay—Pleading.

Delay in issuing a *C. Sa.*, to fix the bail, cannot be pleaded in bar to an action against them on the recognizance.

DECLARATION against defendants on a recognizance of bail entered into by them for one Fowler, in an action brought against him by the plaintiff in this court, alleging a judgment recovered against him, which he had not paid, nor rendered himself.

Plea.—That no writ of *Ca. Sa.* was duly sued or prosecuted out of the said court against the said Fowler upon the said judgment, and duly returned in the said court, according to the practice of the said court.

Replication.—That after the recovery of said judgment, and before the commencement of this suit, to wit, on, &c., a writ of *Ca. St.* (setting it out) was sued out by the plaintiff on said judgment, delivered to the sheriff, and returned *non est inventus*.

Demurrer.—That the writ of *Ca. Sa.* set out in the replication does not appear to have been issued until long after the time within which, by the practice of the said court, the same should have been issued for the purpose of fixing the bail, and that the said replication shews sufficient delay in the issuing of said *Ca. Sa.* to discharge the defendants from liability.

Becher, Q. C., for the demurrer. *Prince*, contra, cited Ch. Arch. Prac. 822, 823.

ROBINSON, C. J., delivered the judgment of the court.

There must be judgment for the plaintiff on this demurrer. There is no time within which a *Ca. Sa.* must be taken out in order to fix the bail, and in general any time given to the principal, or any unreasonable delay in proceeding against him, can only afford ground for applying to the court to stay proceedings. It is not matter that can be pleaded in bar of the recognizance.

Judgment for the plaintiff on demurrer.

SILLS V. HUNT ET AL.

Replevin—Second replevin of same goods—Contradictory evidence—Inconsistent verdict—Verdict against a wrong doer—New trial refused.

H. owned certain land, off which the plaintiff in this case had wrongfully cut and carried away a number of oak staves, and left them upon the bank of a creek not far off. H. replevied, describing the number of staves in the writ as 10,000, and the bailiff under it seized all that were lying together on the bank, believing them to be about 7,000, leaving out only a small number that were scattered. H. then sold to defendant all the staves thus replevied, and afterwards the plaintiff took out a writ of replevin against defendants for 6,000 staves, and under it seized that number from the staves so sold. Both actions of replevin were tried at the same assizes, and in that brought by H., which was disposed of first, the jury found that only 2,730 of the staves belonged to him as having been cut on his land.

On the trial of this case, it was sworn that the number of staves on the bank when the first writ was executed exceeded 15,000, and the plaintiff gave evidence to shew that most of the staves then there had not been cut on H.'s land. It appeared, however, that a considerable quantity had been shipped and sent off by persons in privity with the plaintiff: but the evidence on these points was contradictory.

The jury were directed to ascertain how many staves had been taken from H.'s land, as to which the verdict in the other case was not conclusive, and that as defendants claimed only as his vendees, the plaintiff was entitled to a verdict for any others that there might have been. They found, however, for defendants, and the court refused to interfere, holding that the plaintiff having been clearly a wrong-doer in trespassing on H.'s land, was not entitled to consideration.

REPLEVIN, for 6000 staves.

Pleas—1. *Non detinent.*

2. That the staves were not the property of the plaintiff.

At the trial at Sarnia, before Robinson, C. J., it appeared that Mr. Henderson, the plaintiff in a suit of Henderson v. Sils, tried before this at the same assizes, owned lots 20 and 22, in the 5th concession of Sombra, from off which Sils

had wrongfully cut a number of oak trees, and made them into staves, and drew them down to Bear Creek, on lot number 18, and laid them on the bank.

Henderson, hearing of the trespass, sent his agent to replevy, and the bailiff seized, as he swore, all that were lying on the bank, except about one thousand or less, which were in small piles on lot 18, to which Henderson had no claim, and which were lying near the stumps of the trees from which they had been made upon that lot. Not knowing what number of staves were upon the bank, but meaning to claim all except the small piles, the agent reckoned the supposed quantity according to the number of trees which he found had been lately cut on Henderson's lots, 20 and 22, and taking the common average number of staves which such trees would produce. By this estimate he made the number of staves 10,900, which number he had inserted in the writ of replevin, supposing it to be necessary to state some certain quantity. The bailiff swore that under the writ he seized all except the small piles mentioned, and his impression was that there were about 7000 seized.

About four weeks after, the plaintiff, Sills, took out a writ of replevin for 6000 staves, and had it executed by another bailiff upon the staves that were then found still lying on the bank of the river.

In the interval between the execution of Mr. Henderson's writ and this writ sued out by the plaintiff, Mr. Henderson's agent had sold to the defendants in this suit, Hunt and Barter, the whole of the staves replevied under the first writ, and they had culled them over, throwing out such as they considered not merchantable, and the bailiff who came with the plaintiff's writ took out 6000, the number specified in that writ, and some if not all of these must have been staves which had been replevied under Henderson's writ. The number of staves which were on the bank when the first writ was executed were estimated by different witnesses at from 15 to 18,000.

The first writ directed only 10,900 to be replevied, but the bailiff seized them all, imagining the quantity to be less than was specified in the writ.

Upon the trial of the replevin case of *Henderson v. Sils*, the jury found that 2,730 only of the staves, and no more, were the property of Mr. Henderson, as having been cut off his lots 20 and 22.

When Sils replevied the 6000 named in his writ, he founded his claim upon the assertion that of the large lot of staves which had been drawn to the bank of the river on lot 18, and were lying there when the bailiff came with the first writ, the larger quantity had been cut by him, not on Mr. Henderson's land, but on lots 19 and 21, in the same concession, which he affirmed belonged to one Potts, from whose agent he had bought the trees.

A witness was called, who swore that he was agent for Potts, and as such had sold to Sils the oak trees on these lots; and other witnesses were called, who swore that they had hauled the staves cut by the plaintiff on those lots to the banks of the river, where they were mixed with other staves which Sils had cut upon Henderson's land.

The evidence was not clear and precise as to the number of staves that had been cut on the several lots of land, or as to the whole number that were upon the bank when the first bailiff came, or as to what had become of the whole of those that were replevied under the first writ, and whether the first bailiff had replevied all that he found on the bank, with the small exception already spoken of, or any and what number less than the whole.

It was proved that, including what Hunt and Barter had thrown aside as culls, about 4,000 or 5,000 were still on the bank, a considerable quantity having been shipped by a man named Clancy, and others in privity with the plaintiff Sils, who had absconded from the country, and none having been removed by these defendants.

The objection was taken at the trial that when the plaintiff mixed the staves which he had wrongfully taken from Henderson's land with the other staves, if there were others, he by that act gave a right to Henderson to take the whole lot, since he could not distinguish his staves from the others, and could not therefore be made a trespasser by taking any which the plaintiff, Sils, had thus wrongfully mingled together.

It was objected also that the plaintiff could not legally replevy the staves which had been before replevied by Henderson's writ.

The learned chief justice told the jury, at the conclusion of the case, that admitting that the principle of law referred to might have allowed Henderson to claim all the staves, because those which came from his land had been wrongfully mixed by Sills with the other staves (if there were other), yet it did not appear that Henderson had in fact claimed the whole lot as his, but the writ he had sued out only authorised (as it was represented by his counsel) 10,900 to be replevied; and if there were more left which the bailiff did not seize, then it would seem that the mixing of those with the staves replevied was the act of the defendants, Hunt and Barter, to whom Henderson's agent had sold the staves replevied. They turned the whole over in culling them, and made it impossible to distinguish what had been before replevied and what not; if indeed the first bailiff under the first writ had forborne to levy any but the small piles spoken of, which were lying separate from the others.

He told the jury that upon the whole evidence it appeared likely that the fact was not, as was at first stated, that Henderson's bailiff had replevied either 10,900, the number mentioned in the writ, or the exact number of 7000, which the bailiff seemed to consider he had replevied out of a much larger number, but that he actually had replevied all except the small piles which were piled on lot 18, near the stumps of trees from which they had been made; for Mr. Henderson's agent swore that he claimed all, with the exception of the small piles, as having been cut on Mr. Henderson's lots, and directed all to be replevied, assuming that the number would be about that in the writ, though it seemed that there were more on the ground: that then it was to be considered that that writ only gave authority to replevy 10,900, and that any number that there might be beyond that could not be treated as being held by virtue of the writ; and further, that on the trial of the action of Henderson v. Sills, which followed that proceeding by replevin, the jury

had just determined that Mr. Henderson's claim was restricted to 2730, as being the full number that had been cut from off his land. But the finding of that jury was not binding upon the jury in the present case, because it was merely a verdict on which no judgment had yet been entered, and never might be, and besides the action was between other parties.

He told the jury that the question for them to consider was, what number had been cut from Mr. Henderson's lots, for whatever that number was, he had no right to sell more to the defendants in this action, and as between him and Silles the remainder must be held to belong to Silles; and therefore, if, taking out of the whole lot as many as were really Henderson's, there should remain any number beyond, they would be the property of Silles, for which the learned Chief Justice thought he might recover in this action.

The jury brought in a verdict for the defendants.

Prince obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was contrary to the judge's charge.

McCrae shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The jury probably took an unfavourable view of the conduct of the plaintiff in the matter, and may have doubted, as I confess I did at the trial, whether the story of Silles having cut a large portion of the staves off Pott's lots by authority of his agent was strictly correct, or was a mere pretence to cover trespasses which had been committed on Henderson's land to a larger extent than he was able to prove. And they, perhaps, considered that at all events what Silles had shipped were fully as many as he had any honest title to.

The statute of this province 18 Vic., ch. 118, restraining parties from replevying goods which are already in the custody of the law, was not discussed at the trial nor on the argument of this rule. If it were material under the facts to consider it, we should have to refer to the case of *Crawford v. Thomas*, determined in the Court of Common Pleas (7 C. P. 63.) Here it could not be said that more staves

than 10,900 were in legal custody under the first writ, because the writ, as it was conceded, only gave authority to replevy that number, and if there was a larger quantity, I did not see that the plaintiff would be prevented from replevying them, when the defendants shewed their intention to keep all.

But altogether the case was one which presented many difficulties. I did not see how justice could be done, under the singular circumstances of the case, in any other manner than by making the plaintiff's right to recover depend upon the question of fact, whether there were in fact more staves brought out by the plaintiff to the bank of the river than had been cut off Mr. Henderson's land. If there had been, it was clear that such other staves could not belong to Henderson, and could not, therefore, be legally sold by him to the defendants, who claim only as purchasers from him. Whether there were on the bank of the river a larger number than Henderson had replevied was not clearly made out though, if the testimony of some of the witnesses could be relied upon, there must have been. Under the charge given by me to the jury, they must have understood that if they were satisfied there were more staves in the defendants' possession than had been taken from Mr. Henderson's land, they should give a verdict for the surplus to the plaintiff, because proving possession alone was sufficient to maintain the plaintiff's right against persons who had no right. I told the jury they could not give the plaintiff a verdict for more than 6,000 staves, but for any number within that they should find in his favour, if they were satisfied they had not come off Henderson's land.

We infer from the verdict that the jury seeing that the plaintiff had shipped, or authorised others to ship, a large quantity of the staves after the first writ of replevin was executed, were satisfied that if he did come lawfully by any staves, the quantity which he did honestly acquire were actually got and sent away by him and others in privy with him; and that they were unwilling to incur the risk of doing injustice to others, by trusting very implicitly to the testimony of some of his witnesses.

The evidence at the trial did not give me any more favourable impression of the plaintiff's case than the jury took, though I thought it right to say that his witnesses seemed to establish his right to a verdict for an uncertain quantity.

On the whole we do not set aside the verdict. A wrongdoer, such as the plaintiff was clearly enough shewn to be, may fairly be left to take his chance of the verdict of a jury, where there is no question of law involved, and no complaint of misdirection.

It appeared upon the evidence given in this case, and in an action in the Common Pleas by Henderson against the plaintiff, that he had no scruples about taking timber wherever he could find it.

Rule discharged.

WOOD ET AL. V. STEVENSON.

Cheque—Set off—Pleading.

To an action on the cheque by the bearer against the maker, defendant pleaded that the cheque was given to one B., who had always been the lawful holder thereof, and that the plaintiffs held the same as his agents; that it was given for bills of exchange drawn by B. on H. & Co., and since overdue and dishonoured, whereof B. had notice: that the cheque was held by plaintiffs as B.'s agents, and B. was liable to pay defendant as drawer of said bills the amount of said cheque, and defendant offered to set off the same.

Held, on demurrer, plea bad, for not alleging that the bills were dishonoured before the commencement of the suit.

The plaintiff declared that the defendant and one Conyngham C. Taylor, who is now out of the jurisdiction of this court, on the 14th of March, 1857, by their order for the payment of money, directed to the Bank of British North America, required them to pay to the bearer £456 8s. 9d., and the plaintiffs became the bearers, and the said order was duly presented for payment, and was dishonoured, whereof the defendants had due notice, but did not pay the same.

Defendant pleaded that the said order was given by him and the said Conyngham C. Taylor to one R. H. Brett, and the said R. H. Brett has always been the lawful holder of the said order, and that the plaintiffs now hold and have always held the same as the agents of the said R. H. Brett:

that the said order was given in consideration and exchange for bills of exchange drawn by the said R. H. Brett on Messrs. Haley & Co., in England, and since overdue and dishonoured, whereof the said R. H. Brett had notice, and the said R. H. Brett is now liable to pay that amount on the said bills of exchange to the defendant, and the said check is now held by the said plaintiffs as agents for the said R. H. Brett, and the said R. H. Brett is liable to pay to the defendant, as drawer of the said bill, the amount of the said cheque, and the defendant is entitled to claim the same, and hereby offers to set off the same.

To this plea the plaintiffs demurred, assigning as objections,—

1. That the said plea attempts to set off against the plaintiffs' claim a debt due by the said R. H. Brett to the defendant, and that the said debt of R. H. Brett cannot be so set off in this action.

2. That the said plea admits the right of the plaintiffs to bring this action in their own names, and that therefore only debts due by the plaintiff to the defendant can be so set off.

3. That the said plea does not allege that the said debt was due by the said R. H. Brett to the defendant before the commencement of this suit.

C. S. Patterson for the demurrer, cited *Oulds v. Harrison*, 10 Ex. 572.

McMichael, contra, cited *Emmett v. Tottenham*, 8 Ex. 884.

ROBINSON, C. J., delivered the judgment of the court.

It is of no consequence to determine the demurrer in this case except as regards the costs occasioned by it, for issue in fact having been also joined on the plea, it has been found in favour of the plaintiffs, and the verdict stands.

But we think the plea is bad, if for no other reason, because it does not state that the bills drawn on Haley and Co. had been dishonoured before this action was brought. Before they were dishonoured there could be no claim against Brett upon them, if the right of set-off were in other respects clear, and no set-off can be pleaded which had not accrued before the action was brought.

Judgment for plaintiffs on demurrer.

CORRIGAL ET AL., EXECUTORS OF NOURSE, v. BOULTON.

Bond—Venire facias to assess damages—Suggestion of breaches—Amendment.

Where in an action on a bond *non est factum* is pleaded, and breaches assigned in the declaration, *semble* that no special entry of *ven. fac.* to assess damages is necessary, but if required the court, under the C. L. P. A., sec. 291, will allow it to be made afterwards.

ACTION on a bond, made by defendant to plaintiffs, in £200, with condition for the payment of £100 on the 30th of June, 1856, by one Thomas Roberts, averring that Roberts did not pay the money, and that it was still unpaid.

Defendant pleaded, 1. *Non est factum*. 2. A plea demurred to.

The trial took place at Cobourg, before *Draper*, C. J., when a verdict was found for the plaintiffs.

There was no award of *venire facias* on the *nisi prius* record to assess damages for breach of the condition, and no damages were in fact assessed, but leave was reserved to move to increase the damages to £100 and interest.

C. S. Patterson, for the plaintiffs, obtained a rule *nisi* to shew cause why the assessment of damages should not be increased to £100, and interest thereon, pursuant to leave reserved at the trial.

Read, for defendant, obtained a cross rule on the plaintiffs, to shew cause why a new trial should not be granted, on the ground that no sufficient assignment or suggestion of breaches under the statute 8 & 9 W. III., in that behalf, was entered on the *nisi prius* record at the time of the trial.

Murray v. Earl of Stair, 2 B. & C. 92; *Smith v. Bond*, 10 Bing. 125; *Hurst v. Jennings*, 5 B. & C. 650; *James v. Thomas*, 5 B. & Ad. 40; C. L. P. A., 1856, sec. 291, were cited by the plaintiffs, and

1 Saund. 58; *Rosc. Ev.* 7th Ed. 425; *Quin v. King*, 1 M. & W. 42; *Chit. Junr. Prec.* 420; *Homfray v. Rigby*, 5 M. & S. 60; 2 Saund. 147 *a*, for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

There is no room for an objection that breaches should have been suggested, for the condition of this bond is set out in the declaration, and a breach of it charged. Any

suggestion, therefore, was unnecessary. If there ought to have been upon the record any particular entry of award of *venire facias* to assess damages, which we do not see was necessary, we give leave now to the plaintiffs, under the 291st clause of the Common Law Procedure Act, to make such an entry; and make absolute his rule *nisi* to increase the assessment of damages to the amount of £100, with the interest due thereon; and we discharge the defendant's rule *nisi*.

STEVENSON V. THE MONTREAL TELEGRAPH COMPANY.

Action for negligence in sending telegraphic message—Liability for delay beyond defendants' line—Measure of damages—Fall in flour market.

Defendants owned a telegraph extending to Buffalo only, but in their printed handbills they advertised their line as "connecting with all the principal cities and towns in Canada and the United States," and they received the charge for transmission to places beyond their line. The plaintiff had some flour in the hands of N., his agent at New York, and about 3 p. m. on the 23rd of November, delivered to defendants at Hamilton the following message, addressed to N., paying the charge to New York: "Am disposed to realize—sell 1500 barrels." At the time of delivering the message nothing was said as to its importance, or the necessity for immediate despatch, and owing to the defendants' line being out of order it was not sent till after 5 on the following afternoon—being Saturday. The defendants' operator received it at Buffalo, and on the same day delivered it at the office of the American Company to transmit to New York, paying their charge. It was not received by the plaintiff's agent in New York until after business hours on the 26th, and in the mean time the price of flour had fallen materially. The agent, therefore, did not sell, but held the flour until the end of December, and as the market had continued to fall, it then realized nearly 5s. a barrel less than could have been obtained on the 23rd or 24th. In an action against defendants for negligence in transmitting and delivering the message at New York, the jury found for defendants; and on motion for new trial, *Held*, that the verdict must stand, for the only negligence shewn was in delivering the message at New York, and if defendants were liable for that, they would not be answerable for loss caused by a fall in the market, but under the evidence for nominal damages only.

Per Robinson, C. J., and McLean, J.—Defendants, under the facts proved, could not be held liable for delay beyond their own line, but were bound only to transmit the message to Buffalo, and hand it to the American Company there, paying the charge to New York.

Per Burns, J.—That defendants were liable as upon an undertaking to transmit the message to New York, and deliver it there.

ACTION for negligence in not sending with care and due promptness a message by telegraph from Hamilton to New York, whereby the plaintiff lost the advantage of having a sale of his flour effected as directed by that message to his

agent, and suffered in consequence by a fall in the price of flour which immediately followed.

The declaration contained two counts, in each of which it was charged that the defendants received the plaintiff's message to be sent and conveyed by them to the plaintiff's agent in New York, by means of the defendants' telegraph line, and other telegraph lines from Hamilton to New York, and there to be delivered to the plaintiff's agent within a reasonable time after the defendants so accepting and receiving the plaintiff's message, for certain reward to defendants in that behalf.

The plaintiff then averred it to have been the duty of the defendants to use proper care and diligence in and about the causing the said message to be sent by the defendants' line and other lines to New York, and to cause it to be there delivered within a reasonable time after so accepting and receiving the same.

The breach of duty was then charged—namely, that the defendants not regarding their duty, did not use proper care and diligence in causing the message to be transmitted along their telegraph line, and other telegraph lines between Hamilton and New York, and in causing the same to be there delivered to the plaintiff's agent within a reasonable time after so receiving the same as aforesaid, nor was the said message conveyed to New York and delivered to the plaintiff's agent there within a reasonable time after the same was accepted and received by the defendants for that purpose; that for want of such due care and diligence of the defendants, the message arrived too late; and the declaration then alleged the special damage by reason of the flour not being sold by plaintiff's agent as soon as it otherwise would have been.

The second count was in substance the same.

Defendants pleaded, 1. Not guilty. 2. To the first count, traversing the acceptance and receipt of the message from the plaintiff in manner and form, &c. 3rd. To the same count, an excuse for delay from the wires being out of order—and the same two pleas to the second count.

At the trial at Hamilton, before *Robinson, C. J.*, it ap-

peared that the defendants were proprietors of the Montreal Telegraph Company, and in their printed handbills they advertised their telegraph as "connecting with all the principal cities in Canada and the United States.

In the month of November, 1855, the plaintiff had in the hands of his correspondents at New York 1546 barrels of flour. On the 22nd the agent wrote to him recommending him to name a limit as to prices, so that in the event of a favourable opportunity they might dispose of it. On Friday, the 23rd, about three o'clock in the afternoon, the plaintiff delivered at defendants' office the following message addressed to the agents:—"Am disposed to realize—sell 1500 barrels," and paid them 3s. 3d., the full price for its transmission to New York. Nothing was said then as to the nature or importance of the communication, and no question asked as to the time when it could be sent, but it was not received by the agents in New York, whose office there was about five minutes' walk from that of the Telegraph Company, until a quarter to four in the afternoon of the 26th—Monday. It was shewn that from the 22nd to the 26th the price of flour gradually fell, and the agent, when he received the message, did not consider himself authorised to sell at the prices then current, and therefore held the flour; but the market continued to decline until the end of December, when the plaintiff instructed him to sell on the best terms that could be obtained, and it was disposed of at nearly 5s. per barrel less than could have been obtained on the 23rd or 24th. If the message had been received on the morning of the 24th, the agent thought he could have sold about 400 barrels at the prices current on the 23rd.

For the defendants it was proved that during the greater part of Friday and Saturday the line between Hamilton and Buffalo was out of order, and the message in question was transmitted at 5.24 p.m. on Saturday afternoon, as soon as it could be sent under the circumstances. It might, one witness said, have been sent by Montreal, but that was only done occasionally and in extreme cases. Defendants' line extended only to Buffalo. The price charged by them to that point was 25 cents, and their operator there sent it on, at

7.50, p.m., by the American line, paying 40 cents from thence to New York. No evidence was given as to the time when the message reached New York, and no explanation of the delay in not delivering it to the plaintiff's agents before the afternoon of the 26th.

The learned Chief Justice directed the jury to find,—

1. Whether there was culpable neglect in sending off the message from Hamilton, and whether it might, with due care on defendants' part, have reached New York in time to enable a sale to be made on the 24th or on the 26th.

2. Whether its non-arrival during business hours on the 26th was owing to any delay in taking it to the proper office in Buffalo for transmission.

3. If not, whether the American Company was guilty of negligence in not delivering it earlier on the 26th.

4. If they were, then did these defendants engage to transmit by the American line, and deliver the message in New York, or only to deliver it in due course, with the forty cents, to the proper office in Buffalo, leaving the plaintiff to take his chance of how that Company should deal with it.

And in the event of their finding for the plaintiff, they were directed to assess the damages according to the evidence given by the plaintiff, though the learned Chief Justice expressed it as his impression that for mere negligence defendants would not be liable for loss caused by a fall in the market. The jury however found for the defendants generally.

O'Reilly, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection. He cited *Muschamp v. Lancaster and Preston R. W. Co.*, 2 R. W. Cas. 607; *Scothorn v. South Staffordshire R. W. Co.*, 8 Ex. 341; *Watson v. Ambergate, &c.*, R. W. Co., 15 Jur. 448; *Nutting v. Connecticut River R. W. Co.*, 1 Gray 502; *Hood v. New York and New Haven R. W. Co.*, 22 Conn. Rep. 1, 502.

McMichael shewed cause.

ROBINSON, C. J.—We none of us doubt that a Telegraph Company, like other incorporated companies, if it under-

takes for reward to perform a service within the proper scope of its business, is bound to discharge the duty which they have undertaken with care and diligence, and with a reasonable degree of skill and efficiency ; and that, if they fail in any of these particulars, the person who employed them can recover from them in a court of law compensation in damages for the injury which they have occasioned ; not always indeed to the full extent of what such person may have lost, but compensation for any injury directly and naturally arising from the Company's default, and such as may consequently be fairly supposed to have been within the contemplation of the parties when the service was undertaken.

Taking this view, then, we have to consider, 1st. What was it that these defendants engaged to do ?

2nd. Did they fail, and in what particular, in fulfilling their engagement ?

3rd. Is their failure fairly attributable to neglect, such as should make them legally liable ?

4th. And if so, on what principle should the damages be estimated ?

As to the first point—the contract. What did the defendants engage to do ? I find no case bearing upon this point, where the principles of law happen to have been laid down in regard to a telegraph company. We must take them, I think, from analogy from what has been laid down in regard to railway companies. I have looked through all the English cases I can find on this subject, down to the case of *Collins v. The Bristol and Exeter Railway Company* (1 H. & N. 517), decided in the Exchequer Chamber ; and my opinion is that, though the Montreal Telegraph Company announced in their handbills that they connected with all the principal towns and cities in the United States, they did not thereby declare that they were connected with them in business, but only that they had made such arrangements as would ensure to the public the convenience of their messages being taken up and forwarded to cities and towns to which the operations of the Montreal Telegraph Company do not extend. We see scarcely a railway in the Province, whether the line be long or short, or a line of steamers, in re-

ference to which it is not announced by the handbills which they put out that they connect with railways and lines of steamers leading to the various places to which it is known that travellers chiefly resort. Our Northern Railway Company, for instance, may inform the public that they connect with steamers in Toronto going to Kingston, and to Oswego. In respect to the short Railway between Port Stanley and London, as I happened lately to observe, it is announced in handbills that it connects at London with trains which go east and west to various points named, extending from Quebec to the Mississippi. Such advertisements, in my opinion, mean nothing more than that passengers carried upon the line belonging to the company which puts out these handbills will find the arrangements such as will prevent detention, and enable them to pursue their journey promptly and conveniently to the several points mentioned.

It was never imagined (and it would be a most unreasonable construction to place upon the announcements) that the company giving the public such information were thereby engaging upon their own responsibility to convey passengers safely and without delay along all the lines of which they make mention in their handbills.

Then, besides these handbills, or rather besides the heads which appear upon the telegraph messages, and which are intended to circulate the information I am speaking of, there was nothing shewn at the trial from which to imply a contract, further than that the Company sent the message from Hamilton direct to Newman & Co. at New York, and that they took the 40 cents on behalf of the Buffalo and New York line of Telegraph, which was known to be the price, and by which arrangement the convenience was secured to the person sending the message of having it taken up and continued along that line. Some such arrangement as that is indispensable, or the message must necessarily stop at the end of the Montreal Telegraph line, or it would have to be directed to some agent there, who would have to go to the commencement of the other line, and transmit the same message there, which arrangement would be most inconvenient, and occasion delay and expense.

A traveller can continue his route from one railway to another, and can pay as he goes along, but the person sending the telegraph message cannot accompany it, and pay on each new line the charge for carrying it further. To meet the exigency, it appears the Montreal Telegraph line took from the person sending a message to New York from Hamilton the exact sum which a person going to the office would have to pay at Buffalo for sending on the message from there to New York, and this ensures it going on with that care and despatch for which the Company sending the message from Buffalo is responsible.

I observe in one of the English cases that the arrangement was different, and the Company receiving the package of goods to be carried to a place beyond their line had such understanding with the other Company, that their charge, as well as the charge for the transit over the other line, was received at the place to which the goods were ultimately carried. The court remarked that that shewed the latter Company to be the agents of the former, as they received the money coming to them, and that the first company were therefore responsible for them, as all employers are for the agents they employ.

Here the case is reversed. The Montreal Telegraph Company received the twenty-five cents to be accounted for by them to the American Company, and in that respect were not their employers, but their agents.

In my opinion, what the defendants in this case did had not the effect of making them responsible for the punctual delivery of the message at New York by the servants of the American Telegraph Company to the person there to whom it was addressed.

As to the second and third points in the case—whether the defendants failed in fulfilling their engagement—I only apply that question to the defendants in reference to the transmission along their own line. It was for the jury to judge on the whole evidence whether they were justly chargeable with negligence—that is, with [unreasonable delay—considering the circumstances which were given in evidence to account for the message not going forward imme-

diately. It did not seem to me that the conclusion which the jury came to on that point, acquitting the defendants of culpable neglect, was unreasonable, and if we thought that a verdict the other way would have been as well sustained, or better, by the evidence, we should hardly grant a new trial on that point, unless when the neglect was obvious, and when the consequences that could justly and clearly be traced to it, and for which the defendants would be legally liable, were of considerable amount.

Then as to the last point, it strikes me that the endeavor to make the defendants liable on account of some hours or a day's delay on the part of the New York Telegraph Company to the damages that were claimed in this action, was one that could not in law be maintained, and certainly not in reason. No intimation was given to the office in Hamilton that the plaintiff's message was on business of great commercial importance, and requiring instant attention, so that the failure of an hour or two in delivering the message at New York from the office to the person to whom it was directed might, owing to fluctuations in the flour market, occasion a loss of many hundred pounds.

The words "Am disposed to realize—sell 1500 barrels," do not seem to denote particular urgency as to time. Would the agent receiving such a message be liable in damages if he delayed for a day to act upon it? Whether he would or not cannot decide the question as between these parties.

To expect to make the defendants liable on the evidence given in this case for the difference in price between the time when Newman & Co. received the message, and the time when they might have got it, and might have acted upon it, would be scarcely more reasonable, I think, than it would be to expect to make the proprietors of the Cunard line of steamers liable for the loss incurred by the failure of a house on which a bill was drawn from this country, and remitted by their steamer, during the delay of a day or two on the voyage, which by due diligence might have been avoided; or to make a railway company liable for being some hours behind time for an accidental damage to a pas-

senger, who arrived too late to attend to an important sale, or to give directions in some critical point in his affairs. These were damages not reasonably to be supposed to have been within the contemplation of the parties in transacting the business in question, and therefore not to be recovered, except, perhaps, when there is something fraudulent, or wilfully wrong on the part of the company failing in its duty.

The rule *ntsi* for a new trial should, in my opinion, be discharged.

BURNS, J.—It appears to me the defendants did contract to transmit the message the whole way to New York, and there to be delivered to the plaintiff's agent, and did not merely contract to transmit the same to the end of their line at Buffalo, and there cause the message to be delivered to the American line for the purpose of transmission. The cases of *Muschamp v. The Lancaster and Preston Junction Railway Company* (8 M. & W. 421), *Watson v. The Ambergate, Nottingham, and Boston Railway Company* (15 Jur. 448), and *Scothern v. The South Staffordshire Railway Company* (8 Ex. 341), sufficiently, I think, establish that the defendants, by undertaking to forward messages to any places which, as a matter of fact, were beyond their own line, in fact did contract to do so, and for the purposes of the messages being correctly transmitted and delivered the companies or persons into whose custody or hands the messages were delivered are in fact their agents for the purpose of completing the contract.

The defendants were paid for transmission of the message the whole distance to New York, and I do not look upon the words in their printed papers, which they give to persons desiring to send messages upon which to write the message, namely, "connecting with all the principal cities and towns in Canada and the United States," as being a limitation of their undertaking to send over their own line merely, and that they will do their best to have the message sent forward beyond that. Such words may sometimes have such limitation, but we must always, I think, look

upon the nature of the business done by both parties, their conduct, and all things connected with it, to interpret the meaning. Now, giving parties information that they connect in the manner mentioned amounts to this: when a person goes to the office in Hamilton, he asks, can a message by the telegraph be sent to New York, and the answer is that it can, and then the price for sending is paid. It amounts to no more than that, as it appears to me; and if no more took place between the parties than that, it would be an undertaking to send and deliver the message in New York to the correspondent, without inquiring how it is to be done. All communications are to be strictly confidential, and that provision is an agreement extending the whole distance, I should say. The paper gives no information that the defendants may not be the owners of the line of wires the whole distance to New York, and nothing appears upon the evidence to shew that the plaintiff may not be supposed to have thought the defendants had at least the control of the line, so as to send on his message the whole distance, as he paid for the whole distance.

I do not see that there was any negligence on the defendants' part in not sending forward the message before five o'clock p. m. on Saturday, the 24th of November. It has been argued that it was the duty of the defendants either to forward the message by the line by way of Montreal to New York, or that the person in charge at Hamilton should have informed the person who delivered the message on the 23rd that the wires were out of order to Buffalo. As to forwarding the message to Montreal, and thence over the American Company's wires to New York, it appears that mode is unusual and seldom resorted to, and besides it does not appear what the charges were by that route, so that we can see whether the plaintiff intended that route to be used. The plaintiff paid the price of transmission by the Buffalo route, and I must take it for granted that he selected that route in order to communicate with his agents. Having selected that route, it may be asked, was there any obligation on the part of the defendants to inform him on the 23rd of November that their line was then, at the receipt of

the message, out of order. I do not see that any such obligation existed. The company were bound only to transmit as soon as it could reasonably be done. We know, as was conceded in the argument, that the telegraph is a means of communication extremely liable to be deranged or affected by atmospheric influences; that a communication may be prevented one minute, and yet be fully established the next; that interruptions innumerable, and which cannot be accounted for, may and do occur; and therefore it appears to me it is not reasonable to expect that the company is bound, on every occasion when a person desires a communication to be forwarded, to inform him that possibly the message may not be forwarded for some minutes or some hours. It is more reasonable, I think, to cast the burthen or responsibility upon the persons presenting messages to be forwarded, of enquiring whether they can be sent within any particular time, or of giving information of the particular importance it may be to the party that the message should be forwarded without delay. For want of such information on the 23rd to the defendants, I think the plaintiff must be supposed to be content that the defendants would forward his message without *unnecessary* delay, and the evidence shews they did so. The message was forwarded at 5 o'clock in the afternoon, and sent from Buffalo to New York at half past 7 P. M. on the Saturday, the 24th of November, and reached that evening, and up to this time I do not see that defendants can be charged with neglect of duty. The message was not delivered till late on the Monday afternoon. For all that is disclosed upon the evidence, there was, I think, negligence in that act, and the plaintiff would therefore have a cause of action. It appears that the question of negligence was left to the jury, but they, taking a strong view of the case in the defendants' favour, declined to find the facts specially.

Suppose, then, that the jury should, in strictness of law, have found in the plaintiff's favour, the next question is with respect to the damages which the plaintiff should have recovered, for unless we see that the jury ought to have found substantial damages the court will never disturb a verdict involving no question of right, and where there has

been no misdirection, for the mere purpose of compelling the jury to find nominal damages.

On this point I think the learned Chief Justice was right in telling the jury that his impression was that for mere negligence the fall in the market would not give the plaintiff a ground of action of the nature set up in this case against the defendants, unless the defendants had been informed of the object of the message. They not being flour dealers cannot be supposed to know what the fluctuations of the market may have been, or whether flour then was on the decline or rise. The case of *Hadley v. Baxendale* (9 Ex. 341) has laid down the true rule upon the subject. The cases are collected there which bear upon the question. Trying this case by the rule, it may be asked, how is it possible for any one to say that in the contract to transmit the message in question to New York either the rise or fall of the flour market entered into the consideration of the matter, so far as the defendants were concerned. It may have formed an ingredient with the plaintiff, it is true, but then, as I have before remarked, he should have communicated that information to the defendants, so that in fact that consideration might be said fairly to be imported into and form part of the contract. The defendants could not imply it from the words of the message; and suppose when the message arrived in New York it was found that the market, instead of falling, was rising, how could any one tell whether the plaintiff's agents would or would not have sold the flour in the face of a rising market, any more than in the face of a falling market. It is only mere conjecture, and we see it proved in this very case, as an illustration of what I say, that the parties declined to sell in the face of a falling market after the message was received, and held the flour until January after. The evidence shews that the plaintiff's agents *thought* they might have sold some 400 barrels on the 26th of November if the message had been received in business hours, which might have given the plaintiff about \$75 more than the price was next day. There was no certainty that even 400 barrels could have been sold, the agent only thought perhaps he might have effected sales to that extent. If a contract had been entered into to

deliver on any particular day a quantity of flour at any particular price, and the failure to do it had been caused by the non-receipt of such a message, then the case would have presented some positive evidence. At present the evidence presents merely a conjectural view—that possibly the plaintiff's agents might on the Monday morning have found a purchaser for some portion of the flour, and also that they would have sold it at the then price in the market. It appears to me quite impossible to establish from such evidence what injury the plaintiff can or may have sustained. The case of *Crouch v. The Great Northern Railway Company* (11 Ex. 742) confirms the former case of *Hadley v. Baxendale*, and establishes that in an action against a carrier for breach of duty in not carrying goods, the carrier is not liable for loss of business. Again, in the case of *Hamlin v. The Great Northern Railway Company* (1 H. & N. 408) the Court of Exchequer laid down this rule: “In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated. The plaintiff is entitled to nominal damages at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract. Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule, that generally, in actions upon contracts, no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract.”

If there had been a wilful transgression of duty I am not prepared to say that the jury might not have given vindictive damages, but for mere neglect of duty in fulfilling the contract in this case, and the evidence shewing nothing specifically, nor any estimate of appreciable damages really sustained, but only a probable conjecture or inference of what might have been done if the message had been received on the Monday morning, no more than nominal damages could, I think, be obtained, and for this purpose the court will not set aside the verdict.

McLEAN, J., agreed with the Chief Justice as to the liability of defendants, and concurred in discharging the rule.

Rule discharged.

HORSEMAN ET AL. V. THE QUEEN.

Indictment—Conspiracy—Error.

Indictment charging that defendants H. C. and D. were township councillors of East Nissouri, and F. Treasurer: that defendants intending to defraud the Council of £300 of the moneys of said council, falsely, fraudulently, and unlawfully did combine and conspire unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of the said T. as such treasurer as aforesaid.

Held, bad, on writ of error.

The defendants were tried at the Court of Oyer and Terminer held at Woodstock before *Burns*, J., upon an indictment for conspiracy, which charged that Dennis Horseman, John Carr, and John Johns, on the 16th of January, 1857, respectively held and exercised the offices of township councillors of the Township of East Nissouri, and County of Oxford, and that one John Tay was treasurer of the said Municipal Council of the Township of Nissouri, and that the said Dennis Horseman, John Carr, John Johns, and John Tay, being evil-disposed persons, and wickedly, and maliciously, and unlawfully contriving and intending to defraud the Municipal Council of the Township of East Nissouri, of divers moneys, to wit, of the moneys of the said Municipal Council of the Township of East Nissouri, at the township aforesaid, in the county aforesaid, falsely, fraudulently, and unlawfully did combine, conspire, confederate and agree among themselves, unlawfully and fraudulently to obtain, acquire, and get into the hands and possession of them, the said Dennis Horseman, John Carr, John Johns, and John Tay, and did then, by and in pursuance of such false, fraudulent, and unlawful combination, conspiracy, confederacy and agreement as aforesaid, and for the wicked, malicious and unlawful purpose, contrivance and intent aforesaid, unlawfully, wickedly and maliciously, on the said 16th of January, in the year aforesaid, did meet together at the township aforesaid, in the county aforesaid, and did then and there, in pursuance of such false and fraudulent, and unlawful combination, conspiracy, confederation and agreement as aforesaid, and for the wicked

malicious, and unlawful purpose, contrivance, and intent aforesaid, fraudulently and unlawfully obtain, acquire, and get into the hands and possession of them, the said Dennis Horseman, John Carr, John Johns, and John Tay, divers large sums of money, amounting in the whole to the sum of £300, of the moneys of the Municipal Council of the Township of Nissouri aforesaid, then being in the hands of the said John Tay, as such treasurer as aforesaid, to the great damage of the said Municipal Council of East Nissouri, and against the peace of our lady the Queen, her Crown and dignity.

The defendant Tay was acquitted, and the other defendants were found guilty, and sentenced to pay a fine of £25 each. They thereupon brought error in this court.

The errors assigned sufficiently appear in the judgment.

Eccles, Q. C., for the plaintiffs in error, cited *Regina v. Peck*, 9 A. & E. 686; *Rex v. Biers*, 1 A. & E. 327; *Rex v. Richardson*, 1 Moo. & Rob. 402; *Rex v. Fowle*, 4 C. & P. 592; *Regina v. King et al.*, 7 Q. B. 782; *Rex v. Seward*, 1 A. & E. 706.

R. A. Harrison, contra, cited *Arch. Crim. Plg.* 788; *Rex v. Turner*, 13 East 230; *Rex v. Gill*, 2 B. & Al. 204; *Regina v. Gompertz*, 9 Q. B. 824; *Sydserrf v. The Queen*, 11 Q. B. 245; *Regina v. Rowlands*, 17 Q. B. 671; 12 Vic. ch. 81, sec. 174; 18 Vic. ch. 92, sec. 26.

ROBINSON, C. J.—The question is, whether this indictment charges an offence. For any mere formal defect it is necessary that the objection should have been taken earlier.

I do not think that the indictment does sufficiently charge any offence.

The allegation is, that three members of the Township Municipal Council (which we know must be a majority of the whole council) intending to defraud the *municipal council of their moneys*, &c.

Now, I do not know how the municipal council can be said to have moneys. The public money belongs to the *municipality*—that is, to the incorporated inhabitants of the township—not to the council, which represents them and

acts for them. The money of the township in the hands of the treasurer is no more the money of the council than the money of the province in the hands of the Receiver-General is the money of the Legislative Assembly, or of the Legislature. Then the charge is, that the *three councillors* and the treasurer, intending to *defraud the council of the moneys of the council*, conspired among themselves to get into their hands and possession: that is, to get into the possession of a *majority of the council* and of the treasurer—something—we are not told what. The sense is incomplete.

The council, of which three of the defendants form a majority, having the control of the disposition of the moneys, within the law, and the treasurer the legal custody and possession of the moneys, if the indictment had charged that the defendants conspired to get *the money* into their possession, what it would have charged as a crime would have been the *intention to defraud*, and not evinced by doing any thing unlawful, or by doing any thing, lawful or unlawful, by *unlawful means*.

As the indictment stands in this transcript, the charge of conspiracy is imperfect and incomplete, (perhaps something is left out,) and this would be a defect which cannot be supplied by what follows, which is only the statement of an overt act in pursuance of the conspiracy, which conspiracy must first be sufficiently alleged.

And the overt act is, that the three councillors and the treasurer unlawfully met together, and unlawfully, and for the fraudulent purpose aforesaid, got into their hands—that is, into the hands of the treasurer, who should by law have all the moneys of the municipality in his hands, and of a majority of the council—three hundred pounds of the moneys of the *municipal council*, then being in the hands of the defendant Tay as treasurer. Now, there is nothing unlawful or wrong in the moneys of the municipality (if the £300 had been called their money) being in the hands of the treasurer.

So that there is,

1st. No conspiracy charged (if the indictment is correctly copied).

2nd. No unlawful act stated, because the moneys should be in the treasurer's hands.

3rd. And no unlawful means of getting the moneys into the possession of the treasurer and the other defendants.

4th. And, lastly, the treasurer is acquitted, from which we are to assume that he did nothing wrong, whether because the other defendants only got the money into possession, and not he, or because he did not unlawfully conspire to get it into his possession, but held it lawfully as treasurer, we cannot infer from his acquittal.

I do not see that the indictment certainly charges any thing more than an intent to defraud, without any sufficient charge of a conspiracy to defraud.

BURNS, J.—This indictment is bad in two respects, without considering the question as to the want of setting forth some unlawful means by which the parties charged are guilty of a conspiracy, because one of them is the treasurer of the township and the other three are members of the council. The intent alleged against the parties is to defraud the municipal council of divers moneys of the municipal council of the township. The council is not the corporation, but only the governing body of it. The money in the hands of the treasurer is the property of the municipal corporation—12 Vic., ch. 81, sec. 174—and the treasurer could pay away that money only on the lawful orders of the municipal corporation thereof. The council has no property in the money. That body is the power by which the corporation act. The intent to defraud should have been laid to defraud the municipal corporation of its moneys.

A more fatal defect than that, however, consists in the charge of conspiracy. In the overt act charged it is stated that the parties met together in pursuance of their conspiracy, and did obtain moneys of the township unlawfully; but when we turn back to see what the parties conspired to do, there is not one word shewing what it was they unlawfully conspired to accomplish. The gist of the charge consists in the unlawful conspiracy. The indictment just amounts to this: the defendants, intending to defraud the council, conspired

to do something, without saying what, and that on the 16th of January, 1857, they unlawfully obtained the money of the council.

I suppose they may still be indicted—that is, the three councillors—upon a properly framed indictment.

MCLEAN, J., concurred.

Judgment for the plaintiffs in error.

FRENCH V. LEWIS AND ROWELL—THE GREAT WESTERN RAILWAY COMPANY, GARNISHEES.

G. W. R. W. Co.—Bridge across the Humber—Arbitration under 20 Vic., ch. 146—Claim by Mortgagees—Right to pay compensation awarded into court under 16 Vic., ch. 99, sec. 27—Attachment of debts—Application to Q. B. for money paid into C. P.

The judgment debtors had leased from C. a lot of land on the river Humber, on which there was a stone quarry, and upon an arbitration under 20 Vic., ch. 146, the Great Western Railway Company were directed to pay them £255, as compensation for injury occasioned to them as such lessees by the erection of a permanent railway bridge over the river. Before the arbitration one of them, being then the sole lessee, had mortgaged to a building society his interest in the land, and all privileges as to quarrying stone contained in the lease; and the railway company, being notified by the society not to pay to the judgment debtors the amount awarded, paid it into the Common Pleas. The judgment creditors having obtained judgment in this court, attached the claim, and asked to be allowed to take the money out of court, or for an order on the company to pay it.

Held, 1. That the money being in the Common Pleas, this court could not interfere; but that if they had power to dispose of it, the mortgagees would be entitled before the judgment creditors.

Quære, whether the company were authorized under the 16 Vic., ch. 99, to pay such money into court. See note (a) to page 551.

Quære, also, whether such a debt could be attached.

M. C. Cameron, on behalf of the judgment creditors, obtained a rule on the Canada Permanent Building and Savings Society, and on the garnishees, to shew cause why the garnishees should not pay to the judgment creditor, French, the amount of his debt recovered by the judgment; or why the judgment creditors should not be allowed to take out of court so much of the money paid in by the garnishees as should be sufficient to satisfy the judgment.

The judgment was entered on the 17th of March, 1857, for £310 6s. 11d.

On the 12th of December, 1857, the Great Western Railway Company paid into the Court of Common Pleas £277 18s., as the amount of an award between the said

Great Western Railway Company and Lewis and Rowell, and interest thereon; and also £74 15s., being the amount of an award between the Great Western Railway Company and Lewis, with interest thereon.

On the 4th of October, 1854, the Rev. H. C. Cooper, Rector of Christ's Church, Mimico, leased to Samuel Lewis certain glebe lands appertaining to the rectory, for twenty-one years from the 1st of October, 1854, at a yearly rent of £50, payable half yearly.

And on the 4th of June, 1855, Samuel Lewis mortgaged the same land (reciting the lease to him) to the Canada Permanent Building and Savings Society for the unexpired term of twenty-one years, to secure £400 advanced by the society to him as the holder of four £100 shares in the society, with his privilege of renewal "*and all privileges as to quarrying stone contained in the lease.*"

Lewis bound himself to pay instalments of £9 each on the first day of each month for sixty months, and until the £400, interest and charges, should be fully paid, and all other monthly payments, &c., in respect to his shares, and in case of default in making such payments for six months successively, then the whole sum due was to become payable. Lewis covenanted to insure his life for £400, and assign the policy to the society. In case of default for six months in making the monthly payments, the society might enter into possession of the premises and sell the term, with all the privileges as held by them, or might buy it in. A power of distress was given for instalments in arrear. And Lewis agreed to become tenant to the society and their assigns, at a pepper-corn rent, payable monthly, until default should be made by him in fulfilling any of the covenants, &c., and in case of any default, then from such default at the yearly rent of £108, payable monthly.

On the 5th of November, 1857, certain arbitrators, to whom the Great Western Railway Company, on the one side, and Lewis and Rowell, on the other, had submitted their differences, executed an award, in which they recited that all disputes between the parties in respect of the complaint by Lewis and Rowell, that their private rights had

been abridged by the erection of a permanent bridge over the river Humber on the line of the railway, and their claim of compensation therefor, had been submitted to the arbitrators named, or a majority of them, and that the said arbitrators having heard the parties, &c., a majority of them made their award, directing that the company should pay the said Lewis and Rowell £205 as a compensation for all damages, injuries, rights of action or claims whatsoever of them, the said Lewis and Rowell, for or in respect of the matter by the said indenture submitted, and in full satisfaction and discharge thereof, &c. ; and they gave also directions respecting the costs of the reference and award.

The garnishees filed an affidavit of their solicitor, made in December, 1857, in which he stated that the company owed nothing to Lewis and Rowell, or either of them, except on these awards made by reason of their claim to compensation for the erection of the bridge over the Humber, whereby the leasehold property was lessened in value. That he had received a notice from the Canada Permanent Building Society, that they were entitled to the sums awarded, as the holders of the term of the said leasehold property in respect of which the damages were claimed, and that they demanded that the money should be paid to them, on which account, as he had not yet been able to acquire information of all the facts, he desired to be allowed to pay the money awarded into court, to abide such order as might be made respecting it. He stated also, that on the 5th of December the garnishees were served with a summons from the county court of York and Peel, at the instance of Weatherly and Boyd, as judgment creditors of Samuel Lewis and Francis Arnoldi, calling on them to shew cause why they should not pay to Weatherly and Boyd any debt due by them to Lewis and Arnoldi, or either of them, an attachment order having been previously obtained to cover a debt of £49 ; that the garnishees were opposing that summons, and the proceedings stood enlarged to the 14th of December.

On the return of the rule *nisi* granted this term, affidavits were filed on the part of the Permanent Building Society. One by their solicitor, that when the society took their

mortgage from Lewis, the title to the property mortgaged was examined, and that Rowell had not then any interest in the property. The Secretary and Treasurer of the Society also made an affidavit, stating that default had been made in some of the instalments payable on the mortgage, and that £260 and over was still due to the Society: that there was a stone quarry on the property mortgaged, which at the time of the money being advanced upon such security was represented to be valuable, and it formed the chief inducement to making the loan: that the bridge put up by the Great Western Railway Company, across the Humber, stopped the navigation of the river, and thereby injured the profitable working of the quarry, which injury was the subject of the arbitration, and was compensated for by the two awards already mentioned: that the Building Society, not desiring to occasion expense unnecessarily to the judgment debtors or the Great Western Railway Company, did not prefer any separate claim for compensation for the injury on their behalf, relying upon a distinct understanding between the said judgment debtors and him, the deponent, that the Society should receive a sufficient sum out of the compensation claimed by them to pay off the mortgage debt: that the Society claimed to receive or to have a lien upon the sums awarded under their mortgage: that their mortgage was registered in the county register, on the 8th of June, 1855: and that, independently of the sums awarded, the leasehold property mortgaged was not, as he thought, of any value whatever.

C. Robinson, for the mortgagees, shewed cause.

Irving appeared for the garnishees.

ROBINSON, C. J., delivered the judgment of the court.

1. How can we make an order for paying out money that has been paid into the court of Common Pleas—whether properly or improperly. (See 16 Vic., ch. 99, secs. 7 and 14.) That of course is out of the question.

If it rested with us to determine, then it is to be considered that the judgment in this action was not entered before March, 1857, and long before that the mortgagees (the

Building Society) had acquired the right to any claim Lewis as lessee could have for damage to the stone quarry; or rather, that the damage for which the money was awarded had accrued to them and not to Lewis and Rowell.

We must discharge the rule, we think, for we should not, unless in a clear case, order the garnishees to pay the judgment creditor money which they have already paid into another court; and besides, after reading the affidavits, and considering the contents of the mortgage made to the Building Society, and looking at 9 Vic., ch. 81. sec. 27, and 19 Vic., ch. 99 secs. 7 and 14, and 20 Vic., ch. 146, we cannot treat the judgment creditor as entitled to have his debt satisfied out of this award, even admitting that we could make an order binding on the Common Pleas as to the disposition of the money, and admitting also that this award for compensation for damages was, under the circumstances, that kind of debt that can be attached.

Rule discharged. (a)

WALLACE V. THE GRAND TRUNK RAILWAY OF CANADA.

Damages caused by Railway—Limitation and right of action—Conveyance to Company by plaintiff's vendor.

The plaintiff sued the Grand Trunk Railway Company, alleging that their road passing through his land obstructed the flow of water which used to escape along a ravine, and thereby flooded several acres of his farm, and made his residence unhealthy and unfit to live in. There was no natural stream through the ravine; and no negligence was complained of in the construction of the railway. It appeared that the plaintiff had purchased from one B., who, in 1854, had conveyed to defendants the track, and given a receipt in full for the purchase money, and for all damages occasioned by the railway passing over his land.

Held, that the action could not be maintained.

The first count of the declaration alleged that the plaintiff's land had been taken by defendants for the purposes of their railway, and complained of neglect on defendants' part to erect and keep up fences.

(a) An application was afterwards made to the Common Pleas on behalf of the mortgagees, but that court refused to interfere on the ground that the Railway Company had no right under the 16 Vic., ch. 90, to pay the money in question into court.

At the trial, at Stratford, before *Hagarty, J.*, this count was abandoned, and a verdict taken on the second count, subject to the opinion of the court.

The second count charged that defendant, in making and constructing the said railway upon the said lands so taken from the plaintiff, and adjoining the lands of the plaintiff, obstructed, impeded, and penned back a certain natural stream, which was theretofore wont and accustomed to run and flow in, upon, and across the said lands of the said plaintiff and by reason of such obstruction, &c., of said natural stream, fifteen acres of the said lands of the plaintiff, adjoining the said lands of the defendants, became flooded and covered with water, which caused the said fifteen acres of land of the plaintiff, to become, and the same were, and still are of no use or value to the plaintiff; that the said water so obstructed, impeded and penned back as aforesaid, before and at the time of the commencement of this suit was, and still is, stagnant and unwholesome, and the damp and vapour caused thereby have made the plaintiff's residence in the immediate vicinity thereof uncomfortable, damp, unhealthy and unfit to reside in, and the plaintiff, by reason thereof, has, during all the time aforesaid, until the time of the commencement of this suit, and still is, in a sickly, diseased, and weak state of health, and has during all that time, for the cause aforesaid, not only been unable to do and perform his necessary affairs and business, but he has also been obliged to pay, lay out, and expend divers sums of money in endeavouring to be cured of the sickness and disease so caused as aforesaid; and the plaintiff claimed £200.

Defendants pleaded not guilty by statutes 14 & 15 Vic., ch. 51, sec. 20, and 16 Vic., ch. 37, sec. 2.

It appeared that the injury complained of was, that the railway, which passed by the side of the plaintiff's land, on a level or very nearly so, had the effect of obstructing the flow of water, which used to escape along a ravine from the land which the plaintiff still owned, thereby forcing back the water at wet seasons and after rain, and injuring several acres of the plaintiff's land, and rendering the situation of his dwelling house unhealthy.

There was never any natural stream running through the ravine, but it served, as the plaintiff alleged, as a natural drainage from his land adjoining, and carried off the surface water.

There was no charge in the declaration that the defendants had constructed their railway unskilfully or improperly, or omitted to do anything which would have prevented the injury he complained of.

The land through which the railway ran belonged formerly to one Buschlin. The railway was commenced in 1853, while he owned the land. The company settled amicably with him for the land, which they acquired from him for their track, and for the damages which the construction of the railway would occasion to him; and on the 14th of September, 1854, they took from him a conveyance of the premises, on which was endorsed his receipt in these words:

“Received from C. S. Gzowski & Co. the within sum of £22 10s. currency, in full for right of way, and for all damages occasioned by the Grand Trunk Railway of Canada passing over and across my lands.”

The plaintiff purchased from Buschlin after the Company had made this payment and taken the deed.

The road had been completed and in use several years. The plaintiff claimed damages only for the injury occasioned to them within the last six months.

The evidence was conflicting as to whether the railway had in fact occasioned any such injury as was complained of, but the jury found that it did, and gave £17 10s. damages

The objections taken by the defendants were,

1st. That on the evidence no action could be maintained, but the remedy, if any, could only be by arbitration, as pointed out by the statute.

2nd. That the claim was barred, no action having been brought within six months after the completion of the railway, and the injury being one caused by the construction of the railway.

3rdly. That the land on which the railway was built had been conveyed to the Company for railway purposes

by the plaintiff's grantor, and they had paid him both for the land and the damages consequent upon the construction of the railway; and the injury complained of being caused by such construction the plaintiff could not recover.

4thly. That the plaintiff bought the land from the person who sold to defendants, with a full knowledge of the facts, and after the conveyance to the company, and was therefore bound by the deed and receipt, and must be taken as having got the lands subject to defendants' rights, and to all the injury done by their works.

Anderson, for the plaintiff, cited *L'Esperance v. The Great Western R. W. Co.*, 14 U. C. R. 187; *Knapp v. The Great Western R. W. Co.*, 6 C. P. 191; *Lawrence v. The Great Northern R. W. Co.*, 16 Q. B. 643.

Bell (of Belleville) contra, cited *Cameron v. The Ontario, Simcoe & Huron R. W. Co.*, 14 U. C. R. 612.

ROBINSON, C. J., delivered the judgment of the court.

Independent of the objection taken to the lateness of the action, it fails in our opinion on several grounds.

It is not true, as is alleged in the declaration, that the defendants constructed their railway upon the lands taken from the plaintiff, for they obtained the land on which they constructed their railway from the previous proprietor, Buschlin, who conveyed it to them before he sold the adjoining land to the plaintiff. The plaintiff never had any interest in the land on which the defendants made their railway; and it was proved upon the trial that the defendants had compensated the previous proprietor, not only for the land which they acquired from him, but for all damages occasioned by the railway passing over and across his lands.

Buschlin could not, after giving the acknowledgment which he did, have sustained an action for the injury this plaintiff complains of, for he had accepted compensation for it; and he could not put the plaintiff in a better situation in that respect than he was in himself, nor give a new claim against the Company by disposing of his land.

And, besides, nothing is shewn in the declaration to have been done except what the law allowed, namely, the making the railway, for which there is no right of action, but only a right of compensation to be settled by arbitration, when the parties themselves do not come to any amicable agreement, which they did in this case. There is no allegation here of the railway being improperly constructed.

In our opinion the plaintiff should be nonsuited.

Judgment for defendants.

During this term, the following gentlemen were called to the bar:—WILLIAM BALDWIN SULLIVAN, HENRY MASSINGBERD, ALEXANDER FORSYTH SCOTT, WARD HAMILTON BOWLBY, ANTHONY LEFROY.

TRINITY TERM, 22 VICTORIA, 1858.

Present :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD MCLEAN, J.

“ ROBERT EASTON BURNS, J.

THE MUNICIPALITY OF THE TOWNSHIP OF EAST NISSOURI
V. DENNIS HORSEMAN, JOHN CARR AND JOHN JOHNS.

Commission under 12 Vic., ch. 81, sec. 181—Power to summon witnesses and call for documents—Refusal to appear or produce documents, and procuring clerk to conceal them—Action therefor—Conspiracy—Declaration—Demurrer.

The plaintiffs, The Municipality of East Nissouri for 1858, by their declaration—after alleging that the defendants were township Councillors for East Nissouri during 1856, that a commission was issued under 12 Vic., ch. 81, sec. 181, to enquire into the financial affairs of the township, and the commissioners had thereby, and by force of the statute, all such powers as by law are vested in commissioners under 9 Vic., ch. 38, and were, by virtue of the said commission, and of said statute, empowered to summon witnesses before them, and require them to give evidence, and produce such documents as the commissioners should deem requisite; and that the commissioners in pursuance of their said powers met, and summoned the defendants as witnesses to give evidence on oath, and produce certain documents which the said commissioners deemed requisite—charged that defendants, contriving and maliciously intending to obstruct and delay the commissioners in the discharge of their duties, and in making the said enquiry, and to cause great damage to the plaintiffs by reason of the expenses of said commissioners, and to obstruct and delay them in obtaining said evidence, and to prevent the production of said documents, wickedly, and maliciously among themselves did conspire, contrive, confederate and agree together to obstruct and delay the commissioners in making said enquiry, and to cause great expense to the plaintiffs by increasing the costs of said commission, and to obstruct and prevent them from obtaining said evidence, and to obstruct and delay the production of said documents, and prevent and hinder the said enquiry. And that defendants maliciously contriving and intending as aforesaid, afterwards, and in pursuance of the said conspiracy, &c., refused and neglected to attend before the said commissioners as witnesses, and to give evidence to them, and to produce the said documents, although defendants might, and could, and ought to have attended and given such evidence, and produced said documents: and did procure one N., the clerk of said Municipality, and who as such clerk had the custody and possession of said documents, to part with the custody and possession thereof, and to conceal or remove himself, to avoid being summoned or attending as a witness before said commissioners, and to obstruct and delay the production of said documents before them: and did otherwise procure the said documents to be concealed and kept concealed from said commissioners—whereby the said enquiry was hindered and delayed, and the plaintiffs were in consequence made liable to pay £300 over and above what they would otherwise have been compelled to pay, if it had

not been for said acts and conduct of defendants. That the necessary expenses of executing said commission, as provided by the statute, would not have exceeded £50, except for such unlawful conduct of defendants ; but in consequence and by means thereof, and of the premises, said expenses amounted to £350, and the same were, after the execution of said commission, and before this suit, settled and allowed by the Inspector-General, according to the statute, at £350, being £300 more than would otherwise have been incurred or allowed, and which said sum the plaintiffs had paid to said commissioners before the commencement of this suit.

Upon demurrer, held that the declaration was good. That although a case of the first impression, a good ground of action was shewn, there being a wrongful act done by the defendants without any reasonable cause, and legal damage resulting to the plaintiffs.

As to the various objections taken :—

1. *Held*, that the damage was sufficiently stated, and was a legal damage, being directly occasioned by the act complained of.
2. *Quære* whether the declaration could be taken to allege that power was given by the commission to summon witnesses, &c. If not, the commissioners would have no such power.
3. *Held*, that it was sufficiently averred that defendants acted maliciously, without reasonable or probable cause.
4. That the fact of the costs having been allowed by the Inspector-General at £350, was no answer to the charge made against defendants.
5. That it was unnecessary to aver that defendants had been tendered their expenses as witnesses, there being no provision for such payment.
6. Or that the evidence or documents required were material.
7. That as upon the whole declaration good ground was shewn to sustain an action on the case, it could be no objection that a conspiracy was alleged, and that the facts stated could not support an action for conspiracy.
8. That defendants must be treated as being charged as individuals, not as acting in their capacity of councillors.

The first count of the declaration alleged “that the defendants, during the year 1856, were township councillors for the township of East Nissouri, and then and during the time hereinafter mentioned respectively held, occupied and enjoyed the said offices, and upon the petition of one-third or upwards of the members of the municipal corporation of the township of East Nissouri, and sufficient cause being shewn, His Excellency the Governor-General of this Province, by order in council, dated on or about the 1st of July, 1856, directed to be issued, and thereupon there was issued, according to the statute in such case made and provided, a commission under the great seal of this Province, directed to David Shank McQueen, Esquire, James Ingersoll, Esquire, and George Washington Whitehead, Esquire, the commissioners therein named, directing them, the said commissioners, or as many of them as were therein empowered to act, to enquire into the financial and monetary affairs of the Municipal Council of the township of East Nissouri, and

all things connected therewith, and the said commissioners were thereby, and by force of the statute in such case made and provided, empowered to act in the execution thereof, and had all such powers vested in them as are by law vested in commissioners of enquiry appointed under the Act of the Parliament of this Province, passed in the ninth year of the reign of Her Majesty Queen Victoria, chapter thirty-eight, intituled "An Act to empower commissioners for enquiring into matters connected with the public business to take evidence on oath," and the said commissioners, or such of them as were empowered to act as aforesaid, were by virtue of the said commission, and of the said statute, empowered to summon and require to come before them any party or witnesses, and to require them to give evidence on oath orally or in writing, and to produce such documents and things as such commissioners as aforesaid should deem requisite to the full investigation of the matters into which they were so appointed to examine. And the said commissioners, in pursuance of their said powers, did on the said 1st of July, 1856, meet and assemble together to enquire into the financial and monetary affairs of such municipal corporation and all things connected therewith, and did then summon and require to come before them, the said commissioners, the said defendants, as witnesses, to give evidence on oath, and to produce certain documents which the said commissioners deemed requisite, and which were in fact requisite to the full investigation of the matters into which the said commissioners were appointed to examine—that is to say, the assessment rolls and the collectors' rolls of the said township of East Nis-souri, the minute books and entries of the proceedings of the meetings of the said municipal corporation, the resolutions and by-laws of the said municipal corporation, and the receipts, vouchers, accounts, and other writings relating to the financial and monetary affairs of the said township and connected therewith, and which were required by the said commissioners in the said enquiry. And the defendants, well knowing the premises, but contriving and maliciously intending to obstruct, hinder and delay the said commissioners in the discharge of their duties, and in making the

said enquiry, and to cause great expense and damage to the plaintiffs, by reason of the expenses of the said commissioners, and in and about the execution of the said commission, and to obstruct, hinder and prevent the said commissioners from obtaining the said evidence, and to obstruct, hinder and delay the production of the said documents before the said commissioners, the defendants on, to wit, the day and year last aforesaid, wickedly and maliciously among themselves did conspire, contrive, confederate and agree together to obstruct, hinder, and delay the said commissioners as aforesaid in the discharge of their duties as such commissioners, and in making the said enquiry, and to cause great expense and damage to the plaintiffs, by increasing the costs and expenses of the said commission as aforesaid, and to obstruct, hinder, and prevent the said commissioners from obtaining the said evidence, and to obstruct, hinder, and delay the production of the said documents respectively before the said commissioners as aforesaid, and to obstruct, hinder, and prevent the said enquiry into the financial and monetary affairs of the said municipality ; and the defendants maliciously contriving and intending as aforesaid, afterwards, and during the continuance of the said commission, and on the said 1st day of July, and on divers other days and times between that day and the 1st day of July, 1857, and in pursuance of and according to the said conspiracy, combination, confederacy and agreement, and in order to carry the same into effect, did then, and on the said other days and times, refuse and neglect to attend before the said commission as witnesses as aforesaid, and did neglect and refuse to give evidence to the commissioners as aforesaid, and did neglect and refuse to produce to the said commissioners the said documents respectively, although the said defendants might, and could, and ought to have so attended and given such evidence, and produced such documents respectively ; and did procure one Gregg Nealon, the clerk of the said municipality, and who as such clerk had the custody and possession thereof, to part with the possession and custody of the said documents, or a portion of them, to some person or persons to the plaintiffs unknown, or to the defendants, or some

of them, and to conceal himself, or to remove himself to some place to the said commissioners unknown, for a long time, to wit, for the space of six months, to avoid being summoned or attending as a witness before the said commissioners, and to avoid, obstruct, hinder, delay and prevent the production of the said documents before the said commissioners as aforesaid, and did otherwise cause and procure the said documents to be concealed and kept concealed from said commissioners during the period aforesaid, whereby the enquiry of the said commissioners was obstructed, hindered, and delayed, and the plaintiffs were in consequence made liable to pay a large sum of money, to wit, the sum of £300, over and above what the plaintiffs would otherwise have been compelled to pay, if it had not been for the said acts and conduct of the defendants in pursuance of the said combination, confederacy, conspiracy and agreement of the defendants as aforesaid. And the plaintiffs say that the necessary expense of executing the said commission, as provided by the statute in that behalf, would not have exceeded the sum of £50, except for the unlawful and malicious acts conduct, combination, confederacy, conspiracy and agreement of the defendants as aforesaid; but in consequence and by means thereof, and of the premises, the expenses of executing such commission of enquiry amounted to the sum of £350, and the same were after the execution thereof, and before the commencement of this suit, settled and allowed by the Inspector-General of this Province for the time being, according to the statute, at the sum of £350, being the sum of £300 more than would otherwise have been incurred or allowed, and which sum the plaintiffs have paid to the said commissioners before the commencement of this suit; and by means of the premises the plaintiffs have been and are otherwise greatly prejudiced and damnified."

Defendants pleaded not guilty, and also demurred to the declaration upon the following grounds :

1. That the said count does not shew what damage the plaintiffs have sustained by reason of the acts of the defendants. 2. Nor how the defendants became legally bound to give such evidence or produce such documents. 3. Nor

that the defendants acted maliciously or without reasonable and probable cause. 4. That the said costs when settled and allowed by the Inspector-General formed a debt due by the plaintiffs, and are rightly payable by them, and the decision of said officer cannot be reviewed in this form of proceeding. 5. That the statute in the first count referred to had expired at the time such commission issued, and therefore said commissioners had no such powers as were formerly conferred by said statute. 6. That defendants were not bound to attend as such witnesses until their necessary expenses were paid, nor does it appear that the evidence they could give was material, or that such documents were material. 7. That it is consistent with the statements in said first count that the defendants acted in the premises as councillors of said township, and they therefore contend that they are not liable to be sued for acts so done, or at all events not in a court of common law. 8. That no action will lie for a conspiracy, under such circumstances as are stated in the said first count.

Beard, for the demurrer, cited 12 Vic., ch. 81, sec. 181; 16 Vic., ch. 181, sec. 30; 9 Vic., ch. 38; 14 & 15 Vic., ch. 109, sec. 35; *Grant on Corporations*, 271, 314; *Regina v. Mayor of Cambridge*, 4 Q. B. 801; *Cotterell v. Jones*, 11 C. B. 713; *Davis v. Minor et al.*, 2 U. C. R. 464; *Flight v. Leman*, 4 Q. B. 883; *Fivaz v. Nicholls*, 2 C. B. 511; *Maunsell v. Ainsworth*, 8 Dowl. 869.

D. C. Miller, contra.

ROBINSON, C. J.—From what has been disclosed in other proceedings before us, in which the conduct of these defendants as members of the municipal council of East Nissouri has come in question, there is reason to apprehend that the inhabitants of that township have good ground for complaint against these defendants. The present action is an ingenious effort of the counsel employed by the municipality to obtain redress for the pecuniary injury they complain of, if it be possible, and our desire should be to uphold this action, if it can be done consistently with legal principles.

If there could have been a proceeding by mandamus to compel the production of the books and papers spoken of, which were under the control of the defendants and others as comprising the municipal council in 1856, still such a remedy would not have prevented the injury arising from the delay of which the plaintiffs complain, and could not have given them pecuniary compensation for that injury.

The defendants contend that an action of this nature has no precedent to support it, and the plaintiffs' counsel admits this, but insists that it may be supported on principle and by analogy. Before we determine that it can be so supported we have many things to consider.

The principle on which actions on the case in the nature of a conspiracy may be maintained are perhaps nowhere more clearly and comprehensively discussed than by Lord Chief Justice Holt in his judgment on *Savile v. Roberts* (1 Ld. Raym. 379). That, however, was the plain case of an action brought for the malicious prosecution of a criminal charge, and is therefore not in its circumstances exactly analogous; but it is material to some of the questions which are presented in the present case, as it determines that actions of this nature, though called actions in the nature of writs of conspiracy, yet are in truth to be treated as other actions on the case, with little or no regard to the law upon the subject of actions for conspiracy, which are properly so called; and they are held to be maintainable, in general, when one man suffers legal damage consequentially from the wrongful act of another done maliciously and without reasonable cause, and that the legal damage sufficient to support the action may be pecuniary damage only, without its being necessary that the plaintiff should have been injured in point of reputation, or his personal liberty interfered with.

The defendants' counsel, perhaps, would not concede that *Savile v. Roberts* goes the length of supporting an action on the case on such general ground, when the plaintiff has not been indicted or charged with any offence, nor been arrested in a civil action, nor even had an action brought against him. At all events the defendants have raised certain specific objections to the present declaration.

1st. They urge that it does not shew what damage the plaintiffs have sustained by reason of the defendants' acts; but in my opinion the declaration does shew what damage it is that the plaintiffs complain they have suffered. They state that the corporation, under the provisions of the statute 12 Vic., ch. 81, sec. 181, have been made to pay the expense of the commission of enquiry, and that this expense has been much increased by the delay occasioned by the groundless and malicious refusal of the defendants to give evidence and to produce books and papers which they could and ought to have produced. The corporation, the plaintiffs allege, have had to pay £300 more than would have been allowed against them by the Inspector-General but for that delay.

That is an actual pecuniary damage plainly stated, but still we are to consider whether it is a legal damage, for if not, the case of *Cotterell v. Jones* (6 C. B. 714), cited by Mr. *Beard*, is strong to shew that the action could not be supported.

It certainly was a legal damage, in this sense, that the corporation could not escape paying such expenses as the Inspector-General settled and allowed. The 181st section of the 12 Vic., ch. 81, is express on that point. Then was it a pecuniary damage directly and necessarily resulting from the defendants' alleged wrongful conduct, or was it a damage such as comes within the principle of cases in which the damage claimed has been adjudged as too remotely connected with the wrongful act or omission to be contemplated by the law as naturally arising from it, and therefore not to be allowed for? I come to the conclusion, though not quite free from doubt, that taking the statements in the declaration to be correct, the damage is shewn to have resulted naturally and directly from the conduct complained of, so that the plaintiffs have no difficulty of that kind to contend against.

Of course, whether the conduct of the defendants did occasion the additional delay and expense, as alleged, would be a matter to be proved upon the trial, if the defendants went to trial on a proper record.

If a witness subpoenaed in a civil action delayed coming without excuse, and the party who subpoenaed him was compelled to pay costs in consequence, I think he would have a good right of action, and the corporation in this case were in effect put upon their trial by the issuing of this commission.

The second objection taken is that the declaration does not shew how the defendants were legally bound to give evidence or to produce documents, and this does seem to raise a new and difficult question, as this declaration is framed.

We have to look first at the 9th Vic., ch. 38, then at 12 Vic., ch. 81, sec. 181, and to ask ourselves this question—whether any commission of enquiry issued under 12 Vic., ch. 81, sec. 181, would carry with it the power to summon witnesses, and to hear them upon oath, and to require the production of documents, without any thing being said in the commission itself in relation to such powers.

I think the legislature very probably meant, that in all such commissions as are contemplated by 9 Vic., ch. 38, the power to summon witnesses, &c., should be inserted as matter of course, but they may have meant to reserve a discretion to the government to insert such a provision or not as they might think best; and at any rate, what the statute says is, that the commissioners appointed under the last act “shall have all such powers for the conducting such enquiry *now by law vested* in commissioners of enquiry appointed under the act 9 Vic., ch. 38; and when we look at this last mentioned act it is plain that the *law does not vest* in commissioners appointed under it the power to send for witnesses, and require the production of documents, unless authority to do so is expressly conferred by the terms of the commission.

If, therefore, commissioners appointed to enquire into abuses in municipal corporations, should be held by us to have the power in question without any thing being said about it in their commission, they would have not the same but larger powers for conducting their enquiry than is vested by law in commissioners appointed under the statute 9 Vic., ch. 38.

But if we must hold, as I think we must, that the commissioners spoken of in this declaration had no power to summon witnesses and require the production of documents, unless it was conferred upon them by the commission—that is, by something expressed in it—yet we have to consider whether the declaration does or does not import that the commission which issued to them did confer such power upon them.

I think it does not sufficiently import that the commission contained any words conferring the power in question, for it only tells us that the commission directed the persons named in it to enquire into the financial affairs of the municipality and all things connected therewith, and that “the said commissioners were thereby” (that is, by such command) “and *by force of the statute in such case made and provided*, empowered to act in the execution thereof, and *had all such powers vested in them as are by law vested in commissioners of enquiry appointed by the statute 9 Vic., ch. 38.*” And that they were “*by virtue of the said commission, and of this statute*, empowered to summon and require to come before them any party or witnesses, &c.; and did, *in pursuance of their said powers*, summon the defendants,” &c.

We cannot say that the plaintiffs mean anything more by this than that *by virtue of their commission*, merely directing them to enquire (for this is all we are told of it), and of the statute, the commissioners had power to summon the defendants before them, or to require them to produce documents, though no power to do those things was conferred by the language of the commission. Whether there was in fact any such authority inserted in the commission, or whether the plaintiffs rely upon the statute 12 Vic., ch. 81, as giving it by the mere reference made in it to 9 Vic., ch. 38, does not appear in the declaration; but I think it ought, for everything may turn upon that, and it seems to me that the third objection taken by the defendants to the declaration—that it does not shew how the defendants were legally bound to give evidence, or produce documents, so far as regards the complaint for not attending and not producing documents, is a valid objection, though of course it would

not be if the statute 12 Vic., ch. 81, gave that power of itself to all such commissioners, for then we should be bound to notice that such was their authority.

As to the other objections taken, it is sufficiently averred, I think, that the defendants acted maliciously and without reasonable and probable cause. The substance of the complaint is that the defendants, for the malicious purpose of obstructing the enquiry to be conducted by the commissioners, neglected and refused to attend as witnesses when summoned, and to produce documents, though they could, and might, and ought to have attended as witnesses, and have produced such documents. The case of *Mansell v. Ainsworth* (8 Dowl. 869), cited in the argument, is in this respect a good deal in point to shew that this is equivalent to asserting that the defendants had no reasonable cause for their conduct, which is expressly ascribed to a malicious purpose.

The next objection is, that the mere fact of the Inspector-General having allowed the costs spoken of as fairly to be charged against the corporation, is conclusive to shew that the corporation have been rightly made to pay them. No doubt they were rightly made to pay them, as regards the claim of the commissioners to receive them, for the statute gives authority to the Inspector-General to determine that, but that does not make it less a grievance, and a good legal ground of complaint, if these costs had been increased by the wilful misconduct of the defendants.

As to the statute 9 Vic., ch. 38, having expired, and not being in force when the commission issued, which is the next objection, I have found on examination that it has never been allowed to expire, and that it has been kept in force to this time by continuing acts passed from year to year.

Another objection taken is, that the defendants were not bound to attend as witnesses until they had been paid or tendered their expenses, and that there is no averment of such payment or tender in the declaration.

I do not think that we can hold such an averment necessary in the present case. The declaration states that the

defendants had been members of the council, and it may therefore be fairly assumed that the enquiry which the commissioners were directed to make into the financial affairs of the corporation would involve, or might involve the conduct of these defendants while they controlled the affairs of the corporation; and though the declaration states that they were summoned to attend as witnesses, and to produce documents, it would be more just to regard them as in the light of parties. But, besides, this is not the case of one party suing another in a civil action, and requiring a person to attend as a witness in his behalf. It is a public enquiry, conducted under a public act of parliament, which says nothing about compensation to witnesses; and I know of no authority for holding that persons called before the commissioners would be entitled to compensation for expenses or loss of time, any more than in a case of prosecution for a misdemeanor.

And further, there is this to be considered, which applies indeed to one or two others of the objections—that this is a demurrer to the whole declaration, which contains, besides the complaint against defendants for not attending as witnesses or producing documents, another and distinct complaint, that they procured the clerk of the municipality, who had the papers in his custody, to put them out of his possession, and to conceal himself, and this with the malicious purpose of obstructing the execution of the commission.

That charge in the declaration is at least free from any objection on the ground of not paying or tendering expenses to the defendants as witnesses, and therefore this objection, I think, could not prevail, because it does not affect the whole declaration.

The next objection taken is, that it does not appear that the evidence or documents which the commissioners required from defendants were material. Such an objection does not in the nature of things apply in a case like the present, for the plaintiffs are not in this action ascribing their damage to the loss of the evidence, and the effect that produced in the case, which was not a case of theirs, nor was the evidence required by them. It was the commissioners who

desired it; and if they thought it might be material, and therefore waited for it, and if such waiting occasioned expense which fell upon the plaintiffs, it cannot signify to the plaintiffs, so far as regards the grounds of their complaint, whether it would have turned out that the evidence called for by the commissioners would have been material or not. Besides, the defendants could not tell whether it would have been material or not.

The last two objections are in substance the same, and are in effect this—that for all that is stated it may be that the defendants acted in the premises as councillors, and if so, they are not liable to be sued at law for acts so done; and that upon the statement of facts in the declaration no action for a conspiracy will lie.

As to the latter of these two objections, that on the facts stated no action for a conspiracy will lie, there can be no question. No action for conspiracy, properly so called, would lie on those facts, for that action, as is explained in *Savile v. Roberts* (1 Ld. Raym. 378), would lie only in cases of injury to life or limb, or to personal liberty—that is, a writ of conspiracy lay in such cases only—though in more modern times actions on the case in the nature of conspiracy have been brought also in cases where a party has suffered in reputation, or in property, by a false and malicious prosecution for any crime. And I take it to be also now established that all actions of this kind are regarded as in substance actions on the case, and that if it appears on this record that the plaintiffs have suffered in property, that is, have sustained a pecuniary damage from the non-feasance or misfeasance of the defendants, and if such non-feasance or misfeasance can be shewn to have arisen from the malice of the defendants, and to have been without excuse from any reasonable cause, then I do not consider that it is any sufficient objection to the declaration in such a case to say that it alleges a conspiracy, and that an action for conspiracy properly speaking will not lie upon the facts set forth. We have to ask ourselves whether on the whole declaration we see a good ground for an action on the case sufficiently set forth in substance. If we do, then I do not

think that in the present state of our law any thing that is said in the declaration about conspiracy can create difficulty in the way of the action. If, on the other hand, it should appear that, although the plaintiffs may have sustained the pecuniary damage they complain of, yet that this is a case of *damnum absque injuria*, for that there is no legal wrong of which the plaintiffs are entitled to complain, then in that case we should hold the declaration insufficient.

Now as to the remaining objection—that for all that appears the defendants may have acted in the premises as councillors, that is, in their official capacity, and that for acts so done no action will lie against them—it is a sufficient answer, I think, to that ground of demurrer, that the three defendants are sued as individuals for non-feasance in refusing and neglecting to attend the commissioners as witnesses, and in not producing documents, which they could and might, and ought to have produced.

They are charged also with malfeasance, in procuring the person named, who had in his custody the documents called for by the commissioners, to absent himself, and put away and conceal the documents. If these things, or either of them, would present a good cause of action if done maliciously and without reasonable cause, and if it would relieve the defendants from the charge of acting maliciously and without reasonable cause to shew that what they are accused of doing was done under the constraint or with the sanction of the municipal council, or by themselves in council, and as members thereof, then such defence would avail them where it appeared either by way of special plea, or in evidence on the plea of not guilty, but the declaration as it stands would be *prima facie* good.

On the whole, though this is confessedly an action of the first impression, and though it presents, I think, several nice questions, on which various opinions may probably be entertained, my opinion is in favour of sustaining the declaration, whatever may be the merits of the case when all the facts are fully brought out.

I found my judgment upon the law as laid down in Bacon's

Abridgment, "Action on the case," C. F. H. I. & K., and in Comyn's Digest, "Action upon the case for conspiracy," in the case of Savile v. Roberts (1 Ld. Raym. 379), and in the note 4 to 1 Saunders, 229, 230, in which it is said that in actions *upon the case in the nature of conspiracy* it is the damage sustained by the plaintiff that is the ground of the action, and not the conspiracy: that words inserted in the writ or declaration charging a conspiracy do not convert it into a formed action of conspiracy, but it is nevertheless an action upon the case, and those words are mere surplusage, intended as matter of aggravation, and therefore not necessary to be proved to support the action.

All that is stated in the declaration about the defendants conspiring together to obstruct, hinder, and delay the commissioners in the discharge of their duties, is immaterial to the cause, or at least is insufficient to sustain the declaration, because that could give no ground of action to the plaintiffs; but it is alleged besides that the defendants maliciously contrived and intended to cause expense and damage to the plaintiffs by increasing the costs and expense of the commission (which expenses, we must remember, the statute referred to compels the plaintiffs to pay), and then it charges conduct upon the defendants, in pursuance of such contrivance and intention, which amounts both to non-feasance and to misfeasance, malicious and without cause, and the declaration states a legal damage resulting from such malicious and unreasonable conduct of the defendants.

As I have already observed, the statement in the declaration that the defendants declined to attend and produce the documents, when they could, and might, and ought to have done so, is equivalent to denying that they had any reasonable excuse.

If in any civil action of these plaintiffs against third parties they had had occasion to require such attendance of the defendants, and their production of documents, and the defendants being summoned had without reasonable cause failed to attend, when they could and ought to have attended, and if the plaintiffs had sustained damage in consequence,

they would have had a plain cause of action, the real foundation of which would have been the damage they sustained.

It seems to me that the points of difference between such a case and the present do not necessarily leave the plaintiffs without a remedy for what, according to the statement in the declaration, was a wrong followed by a legal damage.

When I say that the conduct charged against the defendants was wrongful, I must refer again to what I have said upon the question of authority of the commissioners to call for and enforce the attendance of witnesses, which I admit seems not to be plainly given, unless when it is in terms conferred in the commission, which it is not stated to have been in this case; but the declaration does not rest only on the refusal or neglect of the defendants to attend as witnesses. They are charged with maliciously procuring the person who had the papers in charge to put them out of the way, and to conceal them, maliciously intending thereby to obstruct and delay the proceedings of the commissioners, and by that means to cause expense to the plaintiffs.

MCLEAN, J.—It is objected by defendants:—1st. That the declaration does not shew what damage the plaintiffs have sustained by reason of the acts of the defendants.

As to this, the precise amount of damage is stated at £300, being costs of the commission which the plaintiffs have had to pay beyond what they would by law have been obliged to pay had not the commissioners been delayed and obstructed in their enquiry by the acts and procurement of the defendants, so that this objection is unfounded.

2ndly. That it does not shew *how* the defendants became *legally bound* to give evidence or produce documents.

The defendants could only be bound to give evidence or produce documents if required to do so by the commissioners under authority given to them for that purpose. The acts 12 Vic., ch. 81, sec. 181, and 9 Vic., ch. 38, do not confer upon commissioners to be appointed under their provisions any power to compel the attendance of witnesses or the production of documents; but power is given to the Governor, or

person administering the government, *by the commission which may be issued*, to confer upon the commissioners the power of summoning before them any *party* or witnesses, and of requiring them to give evidence on oath or affirmation, and to produce such documents and things as such commissioners shall deem requisite to the full investigation of the matters into which they are appointed to examine. The declaration does not state *distinctly* that such power was contained in the commission to enquire into the financial and monetary affairs of the corporation of East Nissouri, but merely alleges that the commissioners were by *virtue* of the *said commission*, and of the *said statute*, empowered to summon and require to come before them any party or witnesses to give evidence and to produce documents. If the allegation is correct, that by *virtue* of the commission the commissioners summoned the defendants to give evidence and to produce documents, then the neglect or refusal of the defendants to appear, and the delay in their appearance, and in the production of such documents as were within their control, must necessarily have increased the costs of the commission, and thus caused an injury to the corporation of the township which had to pay such costs. If the defendants desired to question the power of the commissioners to summon them, they could have put the plaintiffs to the proof that such power was duly conferred by the commission; but the defendants are charged with something more than delaying the proceedings by their own particular neglect and refusal to attend, and to produce documents. They are charged with having caused the clerk of the municipality to conceal various documents, and to absent himself, so that he could not be summoned to attend as a witness, and the documents which he had could not be procured. The objection does not extend to this portion of the charge, and if the defendants caused their clerk to conceal documents, or to transfer them to the care of other persons, so that they could not be procured, when otherwise they might have been obtained, and the proceedings of the commissioners were thereby obstructed, and the costs increased, that alone would form a cause of action

for which damages might have been recovered. The objection therefore must fail, and it does not apply to the whole cause of action.

3rdly. That the declaration does not shew that defendants acted maliciously, or without reasonable or probable cause.

I do not conceive that malice in the defendants is an ingredient necessary in this case to entitle the plaintiffs to recover, or that it is necessary to shew that they acted as they are alleged to have done without any reasonable or probable cause. It is alleged however that they maliciously agreed and confederated to obstruct the proceedings of the commissioners, and to cause expense in the enquiry; and it is alleged that the defendants might, and could, and ought to have attended and given evidence, and produced the documents required. If they might, could, and ought to have attended and produced the documents, then surely their neglect or refusal to do so must have been without any reasonable or probable cause. The statement shewing an obligation on the part of defendants to attend, and charging them with having refused and neglected to attend, whereby a certain damage has arisen to the plaintiffs, appears to me sufficient; and if the defendants had a reasonable or probable cause for absenting themselves, or for not producing documents, such cause could be urged by them as a matter of defence.

4thly. That the costs of the commission being payable by the defendants. as allowed by the Inspector-General, cannot be reviewed in this form of proceeding.

The action does not call in question the amount of costs, or the obligation of the plaintiff to pay them as allowed, but seeks to recover such damages as the defendants have occasioned in the increase of such costs beyond what they would otherwise be.

5thly. That the statute 9th Vic., ch. 38, had expired at the time the commission issued, and that the commissioners had no such powers as that act conferred.

This objection is unfounded, inasmuch as the statute had not expired; but if it had, the act 12 Vic., ch. 81, confers upon commissioners to be appointed under its provisions all

the powers for conducting an enquiry which *then*, that is, at the time of the passing of that act, were by law vested in the commissioners of enquiry appointed under 9 Vic., ch. 38, so that the powers granted by the latter act would be continued to commissioners under the act to investigate the monetary affairs of municipalities, even though the power of investigating public matters had ceased to exist by the statute expiring which authorises such enquiries.

6thly. That defendants were not bound to attend unless their expenses were paid, and that it does not appear that the evidence they could give or the documents to be produced were material.

It is alleged that the *commissioners* required the defendants to attend as witnesses, and to produce certain documents. There is no provision made for the payment of witnesses in such cases, and non-payment is no excuse to defendants. Whether the evidence or documents were material or not, is not the question. They were required by the commissioners, and the delay having caused an injury to the plaintiffs, they sue for that, and proving the facts are entitled to recover.

7thly. That it is consistent with the statements in the declaration that the defendants acted in the premises as councillors; and they contend that they are not liable to be sued for acts so done, or at all events not at common law.

They are sued as individuals, for acts done and omissions by them in obstructing and delaying an investigation into the financial and monetary affairs of a corporation of which they had been members, not for any thing done by them as members of such corporation. Their being the members of the corporation could not exempt them from attendance as witnesses or the production of documents; and had they been members at the time of the sitting of the commission, their conduct in delaying its proceedings would be more culpable. The whole declaration shews, however, that it is not for any thing done by defendants as councillors that the action is brought, but for acts and conduct wholly apart from their positions and characters as councillors.

8th. That no action will lie for a conspiracy, under the circumstances stated in the declaration.

It is alleged that defendants did conspire together to delay the proceedings of the commissioners and increase costs. That form of statement cannot prevent the plaintiffs sustaining their action, if they can shew that by the joint action of the defendants the proceedings were delayed and the costs increased, or that they were increased by the refusal of defendants to appear to give evidence or produce documents. The action is an action on the case to recover damages, and if the allegation of the defendants having conspired together for a certain purpose had been wholly omitted, the action could equally have been sustained. The insertion of such statement cannot, as it appears to me, make any difference as to the right to recover, if the substantial facts are proved.

I think, therefore, the plaintiffs are entitled to judgment on the demurrer.

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for plaintiff on demurrer.

THE MUNICIPALITY OF THE TOWNSHIP OF EAST NISSOURI
v. HORSEMAN.

Illegal payments authorised by resolution—Recovery by Council of succeeding year—Money had and received—Evidence of illegality as to the different items—Payment for attendance as councillors.

In an action for money had and received, brought by the municipality of a township for 1857, against the defendant, who had been reeve in 1856, it appeared that at a meeting of the council in that year, defendant being in the chair, it was resolved: 1. That the treasurer should pay defendant the sum of £129, "for moneys advanced—attending commission—salary as councillor for 1856—for defending Chancery suit, &c." 2. That the defendant should be authorised to sign an order on the treasurer to pay certain witnesses called by the council their expenses attending the commission, and paying other township officers, &c., not already paid by orders on the treasury. 3. That the reeve should give an order on the treasurer for £10 10s. in favour of N., for services as township clerk.

It was proved that the treasurer paid the £129 to defendant: that the commission mentioned was held under 12 Vic., ch. 81, sec. 181, to examine into the financial affairs of the township: that the suit referred to had been brought by one C. respecting the affairs of the township; but the clerk swore that no documents had come into his possession shewing for what the moneys paid to defendant had been expended, and no evidence was given to shew what portion of the £129 had been received for his attendance in the council. There had been no by-law to authorise any of these payments.

Held, that upon this evidence it should have been left to the jury to say how much, if not all, of the £129 was an illegal payment; and that the resolution, though not quashed, would be no defence.

With regard to the different items mentioned in the resolutions—

Held, as to the "moneys advanced," that nothing could be recovered without shewing that the payment made by defendant was illegal.

As to the charge for "attending commission," that it was *prima facie* illegal, and defendant should have shown his right to it.

That any payment to defendant for attendance at council was clearly illegal, and could be recovered in this form of action by the council of the succeeding year. *Semble*, also, that the treasurer might be indicted for making such payment.

As to the money paid for defending the suit; that it should have been shewn that there was some reasonable ground of defence, and authority by by-law to defend.

As to the second resolution; that the moneys drawn under it must be proved to have been paid to defendant, and not to the witnesses and officers.

As to the third resolution: then as there was no evidence of illegality in the payment, nothing could be recovered.

ACTION on common counts, for money had and received to the plaintiffs' use, money paid, and on account stated.

Pleas—Never indebted, payment, and set off.

At the trial, at Woodstock, before *Burns, J.*, it appeared that the defendant being in the chair as Reeve of East Nissouri, at meetings of the council of that municipality, held on the 16th and 17th of January, 1857, the following

resolutions were passed, two councillors named, Carr and Johns, being also present.

"Resolved, That the treasurer pay D. Horseman, Esquire, the sum of £129, for moneys advanced, attending commission, salary as councillor for 1856, for defending chancery suit, &c."

"Resolved, That the Reeve be authorised to sign an order on the treasurer, to pay certain witnesses called on by the council their expenses attending the commission, and paying other township officers, &c., not already paid by order on the treasury."

"Resolved, That the Reeve do give an order on the treasurer in favour of Mr. Gregg Neelan, for services as township clerk, amount £10 10s."

The treasurer swore upon the trial that he paid the £129 to the defendant upon the resolution in his favour: that the defendant had been engaged in a suit in Chancery about the affairs of the township, which one Cameron had instituted, and that he had expended money on the defence. He swore also that it was the practice for the municipal councillors to pay themselves for their attendance in council, and that the rate-payers knew it; also that he had paid an order to defendant on one Neelan, clerk of the council, without a by-law to authorize it.

The clerk of the council swore that no accounts came to his possession from the former clerk, shewing what the moneys were paid for, which were paid out to defendant, or on his order.

There was no by-law shewn authorising any of the payments.

John Cameron, a witness, swore that he was a councillor for East Nissouri in 1856; that there was a commission appointed to examine into the financial affairs of the township; that the defendant attended before the commissioners and promised to produce papers, but did not do so, and threw obstacles in the way of the commissioners' proceedings. This witness also swore, that he supposed the defendant's attendance before commissioners formed one of the services for which the £129 was paid him; that he himself (Cameron) had no notice of the meeting of the 16th of

January, at which the resolutions were passed, and that the Chancery suit was for an injunction to restrain the councillors from expending the moneys of the township.

He stated that he had seen this defendant pay money to one of the witnesses who attended before the commissioners.

Upon this evidence the counsel for the plaintiffs (the municipal council for 1857), contended that he could recover in this action against the defendant for money had and received to their use, for that under the facts proved it was incumbent on the defendant to shew his right to the £129 paid to and received by him pursuant to the resolutions: that there being no by-law to authorise payment to members of the council for their attendance, the money paid on that account must have been illegally paid, and could be recovered back.

And as to the other services specified in the same resolution, he contended that it was incumbent on the defendant to shew that the claims were such as the corporation ought to have paid; that the mere fact of the defendant having received money for witnesses' fees, and his attendance on a chancery suit, or other matters of the township, was sufficient to shew the payment of such moneys to him to have been illegal, unless he could establish that he had a legal right to make such charges.

The learned judge put it to the counsel to give evidence, if he could, as to what portion of the £129 paid to defendant was for remuneration for his attendance in council as a member; but he offered no evidence for that purpose, and stated his inability to do so.

The learned judge intimated his opinion to be that it was necessary for the plaintiffs to shew that the money was paid, either in the whole, or as to some certain portion of it, upon an account or for purposes which made the payment illegal; and he directed a verdict to be entered for the defendant, with leave to the plaintiffs to move that a verdict be entered for them.

D. G. Miller obtained a rule *nisi* accordingly, to which *Eccles*, Q. C., shewed cause.

ROBINSON, C. J.—The Municipal Council of Nissouri are suing for money had and received, founding their claim to recover on the ground that it was the money of the township illegally paid to the defendant. In such an action, I think that as a general rule the onus of proving that the money was illegally paid lies upon the plaintiffs; for as the defendant did not in fact receive the money for the plaintiffs, that proof is necessary in order to establish that he can nevertheless be treated as holding it for their use. Then what was proved here? It was shewn that the defendant, being at the time reeve of the township, received from the treasurer £129, upon a resolution passed when three members were present, including himself, which sum was expressed in the resolution to be “for *moneys advanced, attending commission, salary as councillor for 1856, for defending chancery suit, &c.*”

Now for “*moneys advanced*” is so indefinite, that we cannot learn from it whether all or any of it was money to which the defendant could have had a just claim. It may have been that upon some contract on which the corporation was liable to a third party, the defendant may, at the request of the council informally made, have advanced moneys on their behalf, which it may have been one of the objects of this resolution to repay him,—and we should not allow such money to be forced out of his hands again in this equitable form of action. It required therefore that some proof should be given of that being an illegal payment.

The next item mentioned in the resolution, “attending commission,” was explained by the evidence given at the trial to refer to an investigation going on before commissioners appointed under 12 Vic., ch. 81, sec. 181, to enquire into the financial affairs of the municipality, at which the defendant had attended as a witness. Whatever was paid him on that account might or might not have been a fair and reasonable charge, according to circumstances which were not explained, though I confess I can hardly conceive how there could be a strictly legal claim to be paid for such a service out of the funds of the township.

The statute makes the municipality liable for the expenses

of *executing the commission* ; but these expenses must first, as the statute directs, be allowed by the Inspector-General, who would hardly think it reasonable to allow the commissioners to be reimbursed money advanced by them to members of the council for attending as witnesses before the commissioners, though, where their own conduct was not impeached, it might under some circumstances seem just. And it is perhaps possible that, in order to relieve the Municipal Council from false imputations of malversation, it might have become necessary for the defendant to attend on their behalf, and give evidence, under such circumstances of inconvenience to himself as might seem to give a just claim to compensation, at least for expenses incurred.

There seems to have been no attempt to give proof at the trial of what the circumstances were in that respect ; and without explanation I should be disposed to think this allowance illegal on the face of it, for in all cases of that kind, where the charge would be *prima facie* unwarranted, the person who has received the money, and must have knowledge of the facts, should shew that it was not so in fact.

As to any part of the £129 that may have been paid to the defendant as a remuneration for his services as a member of the council, there is no doubt that any sum which was voted by the council, by resolution for such a purpose was a clear misapplication of the public money ; and my impression at present is, that the treasurer might be indicted for paying it (a) ; and that the defendant who received it, knowing, as we must assume he did, that he had no right to it, could be compelled in this action, at the suit of the council of the succeeding year, to repay it. But the same difficulty applies in this case as in regard to the other payments made under this most improper resolution,—that we have no means of knowing from the evidence what the amount of that particular charge was.

The remaining item in this first resolution, to say nothing of the *et cetera* at the end of it, is for “*defending chancery*

(a) See *Daniels and the Municipality of Burford*, 10 U. C. R. 478.

suit." What the precise grounds of that suit were, was not shewn at the trial. It might or might not, according to circumstances, have been just and legal that the funds of the municipality should defray the costs of that defence; as, for instance, if it were necessary to defend the suit in order to protect the municipality from suffering injustice in regard to their contracts, or the property or rights of the corporation. But to justify the council in paying such costs out of the funds of the corporation, there ought to have been authority given, and, as I think, a by-law, for making the defence and incurring such charge; and it should appear that there was some colour of defence to the suit, for when a municipal council has been manifestly guilty of corrupt, oppressive, or illegal conduct, and have subjected themselves to legal proceedings in consequence, they but add to the wrong by putting their hands into the public funds intrusted to their management, in order to pay their own costs of attempting to defend what they must know to be indefensible.

Of the other two resolutions, that which authorised the reeve to give an order on the treasurer to pay the witnesses called by the council before the commission of inquiry, could not of itself support a recovery in this action, without shewing that the money drawn under its authority, instead of going to the witnesses, went into the hands of this defendant. And the same remark applies to the amount that may have been paid under the authority of the resolution to township officers. The defendant could not be held liable for it in this form of action, until it was shewn that the money got into his hands: for all that appears he may have received none of it.

The other resolution that was given in evidence authorised a payment of £10 10s. to one Neelan for services as township clerk. As regards that money, there was evidence that the treasurer paid it to the defendant, why and for what purpose was not explained. For all that appeared it might have been money justly due to the clerk, and may have been paid to the defendant for him at his request.

The resolutions carry on the face of them evidence of

great irregularity in managing the money matters of the council, if nothing worse. We have, in one other case at least, remarked upon the propriety of all appropriations of money made by municipal councils being made by by-law. It seems necessary to the careful protection of the public interest, but I cannot say that the statutes clearly render such a mode of appropriation indispensable in all cases, though they do in some.

Then, again, assuming that the resolutions in the present case, or one or more of them, were clearly illegal, it is to be remarked that our municipal acts (I do not yet know what may be contained in the one just passed, *a*) do not provide for removing resolutions and orders into the superior courts of law in order to their being quashed when illegal, as the orders of justices in quarter sessions may be, because *they* are proceedings of courts of record. We have only express authority given us to quash by-laws; and it has been an omission in our municipal acts that the provisions on this subject of the imperial statutes respecting municipal corporations have not been adopted, for the moving against the illegal resolution would give notice of the exception taken to its legality, and would sometimes check in time any action under it.

In a clear case of illegality, such as members of the council receiving wages for their attendance, upon their own vote of the money, I do not at present conclude that the resolution having been passed, and not being quashed, would be any answer to an action like the present for recovering back the money; and have already stated that I think the municipal council of any succeeding year could sustain the action. At present I see no good reason against it, but the misfortune is that in this case we cannot hold that the £129 in the first resolution was all of it an illegal grant of money, for some of it may have been legal, as I have stated, and the evidence affords us no means of separating it into portions, and saying that any particular amount was clearly paid to the defendant contrary to law.

(*a*) The late act 22 Vic., ch. 99, sec. 194, gives authority to quash by-laws, orders, or resolutions.

At the same time it is quite evident that some of the money received by the defendant under that resolution must have been money to which he had no right, as we must assume he well knew, and it may very probably be the case that all of it was illegally paid.

Then this is not the case of the same person or party who paid money with a full knowledge of all the facts suing for it back, which in general he is not allowed to do.

The municipal council is not to be confounded with the corporation. It is the governing body acting on behalf of the corporation for the year. It is moreover a fluctuating body, the council for one year not being identical with the council of another year, and not to be so looked upon, in my opinion, even though it should happen to be composed of the same persons.

We have not here, therefore, the same persons, or the same party which paid the money with a knowledge of the circumstances suing to recover it back, if that would create a difficulty in the way of the action in a case like the present, where the public interests are concerned. If these members of the municipal council in 1856, on the eve of leaving office, had resolved to divide among themselves whatever money was then in the township treasury, without having the decency even to set up any pretence of a claim to it, I conceive the municipal council of the next year could sue them to recover the money back, though there is perhaps some ground for contending that there is no remedy at law in such a case, and that the councillors, as trustees, must be left to be dealt with by a court of equity.

It is not necessary in this case to consider whether the municipal council of the same year could sustain such an action, but if the council of the following year could in such a case recover back from each of the persons the money which he had so illegally appropriated to his own use, then the difference between that case and the present could only be that the one act of misappropriation of public funds would be rather more shameless than the other.

Still I feel the full force of the objection, that no authority has been produced for supporting such an action as the present.

If in consequence of that, or for any other reason, we were really of opinion that the action was not maintainable, then the verdict which has been rendered conditionally for the defendant should be allowed to stand, and our course would be clear; but I concur with my brothers in thinking that an action will lie in a case of this kind, where the illegality of the payment is clear; and if we could see that of the £129 any *certain sum* or sums were illegally paid, or that the whole was an illegal payment, I think we should direct a verdict to be entered for the plaintiff accordingly.

I think upon the evidence we are not in a situation to do that, but that it need not therefore follow as a necessary consequence that the verdict for the defendant should stand. The defendant in receiving money under that illegal resolution was clearly a wrong-doer to some extent, and not improbably to the whole extent. The learned judge who tried the case reports that the defendant and those who acted with him were careful, as it appeared, to act in such a manner as not to leave it in the power of the clerk or treasurer, or of the succeeding council, to shew by documents, or voucher of any kind, what precise sums for particular services were intended to be covered by the resolution. In such a case, as presumptions are frequently allowed to be entertained strongly against wrong-doers, and as the defendant could surely, if he pleased, have explained to the court and jury what he had considered himself entitled to, and had claimed under one head, and what under another, I think the jury might have been called upon to say whether they were or were not satisfied that the whole £129 was an illegal payment, or whether any sum less than that had not been illegally paid to the defendant. I cannot say that the defendant was entitled to a verdict. The case should rather, I think, have gone to the jury.

On a view of the whole case, I think we should grant a new trial, though it has not been moved for, and though upon the rule that was granted our judgment must in strictness, I think, have been with the defendant. The same course was taken under similar circumstances: I refer to *Wright v. Lainson* (2 M. & W. 748-9). Costs to abide the event.

BURNS, J.—On the first consideration of this case I was much pressed with what we see stated in many of the books treating of the action for money had and received, namely, that the plaintiff must substantiate a claim to some particular or specific sum in the first instance, and that here some of the items mentioned in the resolution as being ordered to be paid to the defendant might fairly enough perhaps be supposed to be correct and proper to be paid to him, and as no evidence was given to shew what sum out of the whole was paid for salary as councillor, there was a difficulty in the way of the plaintiffs' recovery in this form of action for any specific sum. In *Harvey v. Archbold* (3 B. & C. 626), Abbott, C. J., said, he "should have thought the plaintiffs ought to be nonsuited for want of evidence of any particular sum that they were entitled to recover." Besides this, there was this further consideration of the subject, that the payment had been ordered to be made by a majority of the council convened as such, though in order to make that majority it was necessary that the defendant should be present, though he might not vote the payment to himself. It would not be presumed that the council in disposing of the moneys of the township had acted illegally, and therefore a further necessity would exist that the presumption of law in the defendant's favour should be rebutted by evidence definite and precise as to the amount sought to be recovered by the plaintiffs. One portion of the money paid to the defendant without doubt was not sanctioned by law, but what that sum would amount to no one, save the defendant himself, could tell, for he had not furnished any account of items or charges.

Upon a careful consideration, however, of the facts and circumstances of the case, and also of another principle with regard to the person upon whom the burthen of proof is cast, which must, I think, be introduced into cases like the present, I feel convinced we are well warranted in adjudging for the plaintiffs. Although the general rule is, that he who alleges the affirmative must prove it, yet the rule is liable to this exception, that it must be governed by the fact within whose knowledge the subject matter of the allegation peculiarly lies, and according to that fact the burthen of proof may be shifted.

Before considering the facts of the present case, how far they may be applied so as to shift the burthen of proof from the plaintiffs to the defendant, it is proper to see how authorities bear upon the proposition that the plaintiffs should give evidence of some particular or specific sum they are entitled to. In *Powell v. Rees* (9 A. & E. 426) the evidence was this description: the defendant had removed coals from closes which had been excepted from his lease, and had sold the whole. The jury estimated the amount so taken from the evidence of surveyors of the quantity of coal excavated. One of the grounds on moving for a new trial was that there was no evidence of price given, but the court refused a rule *nisi*. The case of the Mayor of Harwich v. Gant (5 E. & B. 182) was for the share of certain penalties which the defendant had received from the plaintiffs, and he claimed to deduct certain expenses and charges therefrom, the amount of which was not shewn. Mr. Justice Coleridge says, "The plaintiff, in an action for money had and received, is not bound to shew the specific sum ultimately due; it is enough for him to shew that the defendant holds over money which he ought to pay." In this last case it is true the money which had been received by the defendant was received for the plaintiff, and of course would all belong to the plaintiff, unless the defendant could shew that he had a right properly to make deductions from it. In the case before us, the defendant certainly did not profess to receive any part of the money for any other purpose than to his own use, but yet one part of it he had no right to receive, and as regards that, he must be held to have got the possession of it as for the use of the plaintiffs.

In the case of *Wright and the Municipality of Cornwall* (9 U. C. R. 442) this court quashed a by-law enacted for the purpose of paying the councillors for their services. Again, in *Daniels and the Municipal Council of Burford* (10 U. C. R. 478), although this court did not consider it had power to deal with a *resolution* for such payment, yet it did not hesitate to intimate that there would be a civil remedy, if not a criminal one, and perhaps both, where money had

been illegally taken from the township treasury. Besides these decisions, the legislature, by statute 16 Vic., ch. 181, sec. 9, has enacted that any by-law which should be passed for providing remuneration for councillors after the year 1854 should not be valid, unless by its terms it be limited to take effect at the end of two whole years at the least from the passing thereof. This provision most effectually guards against the councillors for the time being paying themselves for their services.

No account was rendered by the defendant shewing what his claims were against the corporation for moneys advanced, or the costs of the chancery suit, or other matters embraced in the resolution ordering payment to him of the £129, and it was quite impossible for them upon the trial to shew the precise or particular sum illegally charged for those services. If nothing had been said in the resolution about salary to the defendant for his services as councillor, we could not have assumed that it would be necessary for the defendant to have established a legal right to the money voted. That point would have been assumed in his favour, and the burthen of proof would have been cast upon the plaintiffs to make out that the defendant had no legal right to it. Here the resolution, however, does carry proof on the face of it of an illegal appropriation of money to this defendant, and has mixed that up with other charges in such a way that the plaintiffs cannot, unless by the evidence of the defendant himself, shew what that illegal payment was. It is quite true the plaintiffs were in a position to have shewn it by putting the defendant in the witness box, and have compelled him to state it, but we must remember that such power has been the enactment of the legislature. It is a principle which is involved in this case, and that is, when a person mixes up the receipt of moneys which he is not entitled to, and which he must know that he had no legal right to take along with moneys which perhaps he has a legal right to receive and take, and when he has not and will not furnish any proof as to the different items, whether it is not sufficient to shift to him the burthen of proof of shewing what amount he is legally entitled to have paid to him. But holding that

the action cannot be sustained without evidence to shew that the particular and specific sum so illegally appropriated was, will be to allow this defendant to pocket that amount, unless the plaintiffs are driven to use the defendant as a witness, and so affirmatively on their part give the jury some approximate idea of the amount which ought to be returned. It appears to me much more reasonable to hold that the jury would be warranted upon the facts of this case in saying that probably the mentioning of the other items, which perhaps might be legal, with that which was not, was a mere cloak to give money to the defendant which he had no right to take, and that his conduct (for his presence at the council most certainly was the means of effecting the passage of the resolution) was sufficient to cast upon him to shew what the items of the £129 were.

The members, or councillors composing the council, are not the corporation ; they are the agents of the corporation for the management of the affairs and funds of the corporation. When these agents have been proved so to misappropriate the funds of the corporation as to put the money into their own pockets, I think an action will lie against them to recover it back, and when that misappropriation is mixed up with what may be rightfully enough paid, it is but right, in order to operate as a safeguard to the corporation, to cast the burthen of proof upon the agent to separate from the appropriation he has received that portion which he would be legally entitled to take.

This view of the subject renders it proper that in this case there should be a new trial, rather than make the rule absolute to enter a verdict for the plaintiff for the whole £129. Instead of the verdict having been entered for the defendant, with leave to the plaintiffs to change that, and enter for the plaintiffs for the whole sum, the case should have been left to the jury to say what portion of the whole amount may have been received illegally ; and had they been told that they might draw inferences which would warrant the conclusion that inserting some things which would be perhaps legal was only to cloak the other, and so had given the full sum of £129, the court would not have inter-

ferred. We are not called upon to pronounce such an opinion as the jury might have done, and therefore we cannot say that the plaintiffs are entitled to recover the whole sum of £129. At the trial I was inclined to the view that the action must fail altogether, though I could see that there had been an illegal receipt of money by the defendant, but now it appears to me it would have been the proper course to have submitted the case to the jury, for them to say how much of the £129, or whether the whole of it, should not have been refunded.

McLEAN, J., concurred.

Rule absolute for new trial.

POWLEY V. WHITEHEAD.

County court—Title to land in question—Practice.

In an action of trespass in a county court defendant pleaded pleas bringing the title to land in question, accompanying them with the affidavit required by 8 Vic., ch. 13, sec. 13. A nonsuit having been ordered,—

Held, upon appeal, that the effect of the pleas was to oust the jurisdiction of the court altogether: that the judge should therefore have refused to entertain the case; and that the judgment of nonsuit must be reversed.

APPEAL from the county court of the County of Perth.

The first count of the declaration charged that the defendant, being engaged in constructing the Buffalo and Lake Huron Railway across the plaintiff's lands, and in making a certain bridge and embankment across a stream near to his close, intending to injure the plaintiff, so carelessly and improperly executed the work that the waters of the stream were thereby dammed back, and overflowed the plaintiff's land.

The second count was for breaking and entering the plaintiff's close, and encumbering the same with stones and other materials, &c.

Defendant, for a fourth plea, pleaded to the first count, that the land was the soil and freehold of the Buffalo and Lake Huron Railway Company, and that he committed the alleged trespass as their servant, and by their command; and, fifthly, a similar plea to the second count. These pleas were accompanied by an affidavit of defendant, as required

by the 8 Vic., ch. 13, sec. 13, that they were not pleaded vexatiously, or for the mere purpose of excluding the court from having jurisdiction, but contained matter which the defendant believed was necessary to enable him to go into the merits of the case.

At the trial it was objected by defendant's counsel that the pleadings put in issue title to land, and that the plaintiff should be nonsuited. The learned judge took the evidence, reserving leave to move to enter a nonsuit, and a verdict was found for the plaintiff, with £8 15s. damages.

A rule *nisi* having been obtained to enter a nonsuit pursuant to leave reserved, after hearing the parties, the following judgment was delivered in the court below :

“BURRITT, J.—The defendant's third and fourth pleas appear to be pleaded under the 13th section of 8 Vic., ch. 13, and the 20th section of the County Courts Procedure Acts of 1856, with the necessary affidavits therein prescribed, which I take to be my guide in determining whether this court has jurisdiction. See *Latham v. Spedding* (17 Q. B. 440, 20 L. J. Q. B. 302), where, under a plea of not possessed, Lord Campbell intimated an opinion that a county court would try, and it was on the ground that the jurisdiction of the county court was not ousted because the defendant had so pleaded that the title might possibly come in question, though it would be if the question actually came on at the trial, and was really and *bona fide* in issue. I take the pleadings and affidavit for my guide as to whether the jurisdiction of this court is ousted or not in this cause. They may however be instances where the pleadings would be no guide, such as not possessed, and then the court would go on until title was *bona fide* in issue. See *Trainer v. Holcombe* (7 U. C. R. 549), *Lilley v. Harvey* (11 Law Times Rep. 273). In this last case the court said, where there are special pleadings, and the question is raised upon them as to the title to land, the judge can go no further ; and this seems to be precisely the case in the matter upon this motion. It is true the defendant offered no proof of title, but I apprehend it was not attempted from the fact that I told counsel I would hear no

more. I took the facts under a very strong apprehension that I had no jurisdiction, which I then intimated. On further investigation I think I did wrong, and assumed an unwarrantable stretch of jurisdiction. The verdict rendered must be set aside, and a nonsuit entered, with costs."

From this judgment the plaintiff appealed.

C. Robinson, for the appellant, cited *Wheeler v. Sime*, 3 U. C. R. 266; *Hamilton v. Clarke*, 2 P. R. 189; *Lilley v. Harvey*, 5 D. & L. 648; *Trainor v. Holcombe*, 7 U. C. R. 548.

J. Duggan, contra, cited *Sewell v. Jones*, 1 L. M. & P. 525.

ROBINSON, C. J.—The statute which defines the jurisdiction of the county court, 19 Vic., ch. 90, has these words: "Provided always, that the said county courts shall not have cognizance of any action where the title of land *shall be brought in question*," &c.; and the 13th section of the 8 Vic., ch. 13, provides, that no plea whereby the title to land shall be brought in question shall be received without an affidavit thereto annexed that such plea is not pleaded vexatiously, *or for the mere purpose of excluding such court from having jurisdiction*, but that the same does contain matter which the defendant believes is necessary for the party pleading to enable him to go into the merits of his case.

This shews that, in the understanding of the legislature, the pleading a plea which brings the title to land in question (I do not say which *may* bring it in question, but which absolutely and in direct terms does so) necessarily puts an end to the jurisdiction of the county court; for if it did not, the requiring an affidavit would be an unnecessary provision against abuse, since it might be left to the judge to go on and try the cause, in order to see whether the title did really come in question, or whether the putting in that plea was not a mere contrivance to oust jurisdiction.

The fourth and fifth pleas pleaded in this case in the strictest sense brought the title to land in question, and nothing else. The judge could not try a part of the issues: he could not dispose of the issues on these pleas, and there-

fore was bound to stop. The case of *Latham v. Spedding* (17 Q. B. 444), cited for the plaintiff in the argument, is not in point, nor any of those which regard certificates of costs as between the superior courts and the county courts, because there is no pleading in the courts referred to in those cases, and the judge is to say, after hearing the evidence, whether anything has been shewn which should take away his jurisdiction ; and they hold that either party merely saying that he claims the land, or has a right to possession, is not enough, unless the course of evidence in the cause raises such a question. But here a plea is pleaded, and issue is joined upon it, setting up as defence a matter of which the statute disables the court from holding plea, and that necessarily takes away the jurisdiction of the court. After the defendant has sworn that his pleas are not pleaded vexatiously, the judge is not at liberty to entertain the surmise that they mean nothing. The defendant has pleaded them at his peril, and the inferior court has no jurisdiction to enquire into the truth of them.

In the case of *Lilley v. Harvey* (5 D. & L. 653) *Wightman, J.*, rests upon this distinction, "When there are special pleadings," he says "and the question is raised upon them, the judge can go no further ; but where the question is not raised upon the pleadings, but is merely suggested by the defendant, the judge must enquire into the circumstances before he can be satisfied that title does come in question." In *Tinniswood v. Pattison* (3 C. B. 248), a case of replevin commenced in the county court, in which the proceedings were reviewed in error upon a writ of false imprisonment, the court held clearly that the jurisdiction of the county court was at an end the moment the title to the freehold was pleaded.

In my opinion there was an end of the case, legally speaking, in the county court when these pleas were put in, for then there was an issue raised which the court could not try, and as a consequence I conclude that what was done afterwards was *coram non judice*. We have not a judgment of the court before us that we can examine into for the purpose of reviewing the correctness of that judgment in itself ; but

under the power given to us by the statute 8 Vic., ch. 13, sec. 57, we reverse the judgment of nonsuit, because that was a proceeding which we think it was not competent to the court to adopt in a case in which they had no jurisdiction; and then the case will rest in that court, and nothing further can be done in it.

If the plaintiff should again bring it forward in that court, a prohibition might be applied for, or the judge, when the record is again brought before him, should refuse to entertain it. It may be considered whether a *certiorari* would not be an expedient course.

MCLEAN, J.—When the issue on the record related wholly to trespass or injury to land, and was sworn to as material to the merits, I think the learned judge should at once have declined to proceed in the suit; but when the evidence on behalf the plaintiff was called and interrogated as to the trespass complained of in the declaration, with respect to which issue was joined, he surely should have stayed all further proceedings in a matter over which he could exercise no jurisdiction whatever. It appears to me that all the orders made, and the rules granted, are wholly nugatory and invalid, and that the judge has no power to enforce any of them. I concur fully in the judgment, that the order for, and taxation of, costs as upon a nonsuit must be reversed, and the case dismissed.

BURNS, J.—It is very unfortunate for these parties that so much expense has been incurred uselessly, for the plaintiff will have to retrace his steps, and take the course now that he should have done when the defendant put in the two pleas, the 4th and 5th, to the 1st and 3rd counts of the declaration. These pleas are not pleas to the jurisdiction of the court, but they are pleas in bar to the merits of the action, though they involve an issue—namely, the title to the land—a point which the legislature has declared shall not be investigated in the county court. The 13th section of 8 Vic. ch. 13, enacts, that when such a plea shall be put in it shall be accompanied by an affidavit that the plea is not

pleaded vexatiously, or for the mere purpose of excluding the court from having jurisdiction, but that the same contains matter which the deponent believes is necessary to enable the party to go into the merits of the case. The judge was quite right when he finally came to the conclusion that he had no jurisdiction. I take the meaning of the legislature to be this—that when a plea is put in, involving the title to land, accompanied by the affidavit prescribed, immediately the jurisdiction of the court ceases.

If the plea were not accompanied by such an affidavit, the court would order it to be taken off the file because of its irregularity, but when the defendant swears that it is necessary for his defence upon the merits to have the title brought in question, then the jurisdiction ceases. The judgment ordered by the judge of the county court of nonsuit cannot be sustained. He had no jurisdiction to do that, and therefore his judgment must be reversed. Upon a plea to the jurisdiction of the court there can be no judgment which involves the question of costs in the defendant's favour. If the judgment be in the defendant's favour, then it should be that the defendant go thereof without pay, &c. —See *Dempster v. Purnell* (3 M. & Gr. 375). In this case no judgment whatever can be given. A nonsuit cannot be ordered, for it cannot be told whether the plaintiff may not sustain his case in the proof, and the defendant cannot go into evidence, because it brings the title in question, and he has sworn that it is necessary to the merits of his defence that he should bring the title in question. In this case it appears the plaintiff did sustain his case *prima facie*, for the jury found in his favour, but the defendant offered no evidence to sustain his pleas, for the judge told him he would not receive it. The judge ultimately ordered a nonsuit to be entered, for that he had no jurisdiction. This course was wrong, for the effect of that is to give the defendant costs, and that because he has pleaded a defence which the court cannot dispose of, or say whether it affords a defence or not. The judge of the court should have said to the parties that the whole proceedings from the plea down were *coram non judice*, and he should have refused to proceed with the case,

and should not have given any judgment whatever. The course which the plaintiff should have pursued was, upon the plea in bar being put in, the trial of which could not take place in the county court, to have removed the cause into the superior court by *certiorari*, and have proceeded with the case there; and if he had succeeded he would have been entitled to the costs of the superior court, as far as the case had proceeded in that court. We should pronounce now the opinion which the judge of the court should have expressed to the parties as soon as he saw the state of the record—namely, that all the proceedings upon the pleas were *coram non judice*.

Appeal confirmed.

THE GORE BANK V. THE MUNICIPAL COUNCIL OF THE COUNTY OF MIDDLESEX.

Agent acting for plaintiffs and defendants—Misappropriation of defendants funds—Application of plaintiffs' money to make up the deficiency—Right of action by plaintiffs.

One S. was treasurer of the county of Middlesex and agent of the Gore Bank, having his office for both purposes in the same building. The council had no account with the bank, and did not direct S. where to keep his funds as treasurer, and he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, without the knowledge of the council, and having misapplied the moneys of the council, overdraw that account without the knowledge or authority of the bank, nearly £8,000, for the purpose of paying debts due by the county for interest on indebtedness and other claims, which he ought to have paid out of the moneys received by him as treasurer. The coupons on some of these debentures were stamped by S. as paid by the Gore Bank.—S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use. *Held*, that no portion of it could be recovered.

ACTION on the common counts for money paid by the plaintiffs for defendants at their request, and for interest.

Plea,—Never indebted.

The plaintiffs claimed £7784 14s. 3d., with interest, in all £8,034 9s. 3d.

At the trial, at Toronto, before *McLean*, J., it appeared that one Street was agent of the Gore Bank in the city of London, in Upper Canada, and had charge of the branch of that bank established there from May or June, 1850, to the 26th of September, 1857.

He was also county treasurer of Middlesex, from April, 1850, to the same 26th of September, 1857.

He lived in the building in which the business of the bank was conducted by him, and kept his accounts and vouchers, and transacted his business there. The Municipal Council of the county of Middlesex had no account in the Gore Bank, and had no occasion to apply to them for making payments on behalf of the county, as the moneys which from time to time came into S.'s hands as treasurer were more than sufficient to meet all disbursements which he had to make for the county. They gave him no directions where to keep his funds, nor interfered with him in that respect, and had not sanctioned his keeping any account as between the Gore Bank and the county; but in his evidence, taken under a commission in the cause, he swore that he did in fact open an account as treasurer with the Gore Bank agency in London, in May or June, 1850, and continued to keep such an account till September, 1856, when he left Canada and went to the United States.

He exhibited what he stated was a copy of this account, from the 1st of July, 1857, to the time he went away and ceased to hold either office. It began with a balance of £407 4s. 1d. to the credit of the county, which he swore was correct, and it contained, as he stated, only entries of moneys paid on account of the county and paid out for them. It exhibited a balance overdrawn from the bank of £7,884 14s. 3d. on the 22nd of September, 1857, about £4,000 of which was charged in the account as paid for coupons on county debentures, either presented to him by the holders, or lying in the bank for collection, and which it was his duty as treasurer to have taken up with the county funds which he had received.

He was asked whether the plaintiffs and the defendants were aware that he kept his accounts there. His answer was that the plaintiffs (the Gore Bank) were aware of it; that the finance committee of the county council were probably aware of it incidentally, but that it never came before either the defendants or such committee officially.

He swore that he had no authority from the defendants

to overdraw, and that it was done without their knowledge: that the coupons, receipts and other vouchers for the debit side of this account were then in the possession of the defendants, or at least were given to them on the 25th of September, or a few days after, but without the direction or knowledge of the plaintiffs: that all the sums charged in the account produced as being paid by the bank, were payments made by the witness to persons who had legitimate claims on the county treasury: that the defendants had so far recognized and taken advantage of these payments, that they had audited his accounts containing them (as he was informed) which had been rendered by him: that the account which he kept as bank agent, of the moneys paid and received, was kept latterly at least under the heading of "county treasurer:" that the sums entered on the debit side of the account produced were paid with the money of the plaintiffs, and that the balance of £7784 14s 3d. was justly due to them. The question was from whom, from the witness himself, or from the defendants, whose money, with which he ought to have paid those charges, he misapplied, and of his own accord took from the plaintiffs' moneys in his charge what was necessary for supplying the deficiencies which he had thus created?

Upon his cross-examination he swore that when he made up his accounts, after he left London, he found himself in arrear with the county as their treasurer about £7,250: that in the books of the county, and in the accounts rendered by him as treasurer to the county clerk, he credited himself as treasurer with all the items which appeared in the account on which the plaintiff now founded their claim in this action: and he admitted that if the defendants were compelled to repay to the plaintiffs the balance claimed by them in this action of £7,784 14s. 3d., then his deficiency in account with the defendants as their treasurer would be increased by that amount—that is, he would owe the defendants that sum in addition to the £7,250, which was the then acknowledged balance against him.

He stated that while he was in office he occasionally kept an account also with the Commercial Bank, and a small

account with the Montreal Bank, in his name, as he thought, but consisting of county funds: that the account which he kept with these plaintiffs, the Gore Bank, was kept for his own convenience: that he had received no instructions from the defendants to keep his account as treasurer there, nor with any bank: that when the funds of the county were insufficient to meet the demands upon them, loans had been obtained from the plaintiffs to supply the deficiency; but these were generally on the guarantee of individual members of the county council, and on one occasion a loan was obtained from the Agricultural Society, on debentures deposited with them. He said he did not know of loans being obtained in any other way: that he had overdrawn his account before the 1st of July, 1857, but that he did not think the defendants were aware of it.

He was asked whether he had not in his hands county funds with which he might have paid all the disbursements for which the plaintiffs were claiming in this action, the £7,784 14s. 3d., and his answer was, "I should have had," by which he was understood to mean that he would have had the funds, if he had not spent them without the sanction or knowledge of the council, and for his purposes, not for theirs, and he swore that both his offices of county treasurer and bank agent were held in the same room (that is, in the building occupied by the Gore Bank) for his convenience, and without any instructions from the defendants, and that before he was agent for the Gore Bank the office of county treasurer was held in the Bank of Montreal, in which bank he was then employed.

A book was produced on the trial, in which the coupons for interest on county debentures which had been paid and returned by the treasurer to the county clerk or council, were pasted upon leaves appropriated to the accounts of debentures issued under the several by-laws. These coupons were for interest payable at different periods in 1855-6-7. They were some of them made payable on the face of them at the county treasurer's office, others of them at the office of the agency of the Gore Bank (which in fact was the same place) and others at the Bank of Upper Canada; and many

of them were stamped "Paid Gore Bank agency," with the date stated.

Many vouchers were produced upon the trial, which S. had taken to shew the payments made by him as county treasurer from the 1st of July, 1857, to his departure, bearing on the face of them nothing to shew that the payments had been made through the bank agency, much less from bank funds, and not from funds of the county. These vouchers remained in the possession of the treasurer, and after he had left the province in September or October, 1857, the clerk of the county of Middlesex followed him to the State of Michigan, and found him there, and obtained from him such directions and authority as enabled him on his return to London to get possession of these vouchers from the person in whose charge they were; and having received them, he took them to the treasurer, and got him to make up from them an account to shew how his affairs stood as county treasurer, and to shew also what demands against the county he had paid.

The treasurer's accounts had been audited up to the 13th of June, 1857, and at that time a balance of £8,417 2s. 6 $\frac{3}{4}$ d. appeared in his cash book as being in his hands to the credit of the county; and according to the account which he made up at Detroit, in December, 1857, at the request and for the information of the council, he then owed the council a balance of £7,042 8s. 5d.; that is, admitting that he had made out of the county funds all those payments for which the plaintiffs were seeking in this action to recover against the defendants.

The account, as made up by him in Detroit, shewed the balance of county funds in his hands on the 1st of July, 1857, to be £13,849 9s. 6d.

The clerk of the council swore that S. as treasurer was furnished by the county with ample means to pay all debts becoming due by the county up to the time of his absconding, and that he ought to have had in his hands, besides those payments, £7042 8s. 5d. He had received for the county, between the 1st of July and the 14th of September, £4085 17s. 4d. The accounts made up by S. in December,

1857, in which he *took credit to himself* for all disbursements on the debit side of that account, had been since audited and allowed by the county council.

The county clerk swore that on the 30th of July, 1853, the county got a loan from the plaintiffs (The Gore Bank) of £2000, which was repaid in April and August following, and this was the only transaction they had with the plaintiffs up to that time; that in October, 1854, another loan was made by the Gore Bank to the county of £4,500, and repaid in January and May, 1855; that the only other transaction with the plaintiffs related to Coupons in June and July, 1855, amounting to £139 10s. 0d., and that there was no other account with the plaintiffs appearing in the treasurer's books; that the treasurer's accounts were generally examined and audited at his own house; that he was at liberty to keep his accounts where he thought proper; and that his accounts were audited before each meeting of the council.

It was stated by Mr. Hutchinson, one of the witnesses called for the plaintiffs, and from whom the vouchers were got, that he heard the treasurer state, before he went away, *that his arrears to the Bank* would be about the amount which the plaintiffs were claiming in this suit.

The only witness called for the defendants was the warden of the county, who had been in office from January, 1856, and a member of the council, since 1851. He swore that he was not aware, nor so far as he knew was any other member of the council, that the treasurer had any account with the plaintiffs on behalf of the county: that any money which the plaintiffs had lent to the county was advanced upon promissory notes signed by the members of the council as individuals, and not by the council as a municipal body: that he remembered no enquiry being made as to where the treasurer kept his funds, and that the treasurer being responsible could keep them where he pleased: that he was aware that some township treasurers had paid money into the Gore Bank in the absence of S. which should be paid to him as treasurer; that he did himself on one occasion leave money in the bank for him as treasurer,

to be carried to the credit of a township, but did not know of this being a general practice.

The defendant's counsel contended that upon the evidence the plaintiff had no right of action against the defendants.

The parties left the case by consent to the decision of the court upon the evidence, a verdict being taken for the defendants in the meantime, with leave reserved to move to enter a verdict for the plaintiffs.

Becher, Q. C., (*A. D. McLean*, with him,) obtained a rule *nisi* in pursuance of the leave reserved, to enter a verdict for the plaintiffs for £8034 9s. 4d., or such other sum as the court should think right upon the evidence.—They cited *Stevenson v. Mortimer*, Cowp. 806; *Ancher v. The Bank of England*, Doug. 637; *Clarke v. Shee*, Cowp. 109; *Story on Agency*, Ed. 1857, secs. 308, 437; *Newton v. Belcher*, 18 L. J. (Q. B.) 53; *Smith v. Birmingham Gas Company* 1 A. & E. 526.

Elbott shewed cause, and cited *Sayles v. Blane*. 14 Q. B. 205; *Wills v. Wells*, 8 Taunt. 266; *Grissell v. Robinson*, 3 Bing. N. C. 10; *Tappin v. Broster*, 1 C. & P. 112; *Barron v. Fitzgerald*, 6 Bing. N. C. 201; *Pownall v. Ferrand*, 6 B. & C. 430; *Smith v. Davidson*, 4 U. C. R. 191; *Kitson v. Short*, Ib. 220; *Aikin v. Howcutt*, 7 U. C. R. 143; *Waddle v. McIntosh*, 7 C. P. 49; *Bowlby v. Bell*, 3 C. B. 284; 12 Vic., ch. 81, sec. 172.

ROBINSON, C. J.—There is a large sum at stake in this action. The question is, whether a loss of £7000 and upwards is to be borne by the Gore Bank or by the County of Middlesex.

The circumstances of the case are such that both parties are fully warranted in contending for the strictest application of any principles of law that may seem to be in their favour. Neither can attribute the loss to a confidence imprudently placed by the other in the treasurer, for he was confided in by both; and the Bank, on the one hand, and the Municipal Council, on the other, have the interests of others committed to their charge, which they are bound to do their utmost to protect.

The plaintiffs are claiming in this action re-payment from the county of upwards of £7000, which they say they paid out *to the use of the county, and at their request*, between the 1st of July and the 26th of September, 1857. An account is exhibited of these payments in detail, from which it is plain that they are all payments made for the purposes for which the county was bound to provide; and this I take to be conceded on the part of the defendants.

There is nothing in the evidence, I think, that would warrant us in looking upon some of these payments as standing on a footing distinct from the others. For anything that I can see proved, the defendants are liable for all the sums which the plaintiffs claim by the account produced to have paid for them, if they are liable for any of them. In the argument it was attempted to treat the sums paid for coupons, which the treasurer had taken up as treasurer, as standing on a different ground from the other payments, but I do not think that the evidence places them on any different footing. It was not proved that the bank were the holders of the debentures for their own benefit. We were asked to infer it from the fact that a stamp of the Gore Bank agency appears on some of the coupons, but that really proves nothing. Some of the coupons were expressed to be payable at the Gore Bank agency in London, others at the Gore Bank at Hamilton; others at the treasurer's office, and a few at the Bank of Upper Canada. Many of the coupons pasted in the book produced on the trial, have upon them the stamp, "paid Gore Bank agency," but I found none of them so stamped which had not been taken up before July, 1857, the period in question. Those in respect of which payments were made which are reclaimed in this action are without any such stamp. Besides, the stamp proves nothing conclusively under the circumstances. It might only mean that the coupons had been taken up at the bank. The defaulter was bank agent as well as treasurer for the county. He could use the stamp as he pleased, and his putting the stamp on any of the coupons which are now in question, if he had done so, would have proved nothing more than that the coupons were taken up in the office where he kept his money as treasurer.

It would not prove that they were not taken up with the money of the county, as they ought to have been. If it had been shewn that the Gore bank were beneficial holders of the debentures, and that the coupons for interest had been paid out of their own money, then I suppose the plaintiffs mean to contend that the coupons must be looked upon as not yet paid to them at all, and that they must consequently have a good right to sue for the amount. Without holding at present that that consequence would be found necessarily to follow, considering that it was their own agent having their money in charge that upon this supposition must have made such an application of their money, and not with the privity of the defendants, and while he had in his hands, or ought to have had, ample means to pay those coupons out of the county funds, it is at any rate clear that if the plaintiffs could claim in respect of the coupons as being yet unsatisfied, it must be a claim upon the instruments themselves, and the money could not be recovered upon this declaration as for money paid by the plaintiffs to the use of the defendants. But, as I have already stated, I see no ground in the evidence before us for inferring that the money due upon the coupons included in the account from the 1st of July to the 26th of September, 1857, was money due to the plaintiffs.

For all that appears, the coupons may have been all brought to the treasurer as treasurer at his office in the Gore Bank agency, by individual holders of them, who were paid as others were that had claims upon the county.

Then as to the plaintiff's right to recover in respect of any part of the account, I do not see upon what principle it can be supported. There is a complication in the case from the circumstance that the same person who was treasurer for the county was also employed by the plaintiffs as their agent. But it would be a mistake, I think, if the case could turn upon that, to look upon the treasurer as standing altogether in the situation of the agent of the defendants. In one sense he was: that is, he acted for the municipality; but he was a public officer, whose duties were defined by act of parliament: he was the agent of the law. For the most

part the county moneys which he received were paid into his hands by other public officers under the provisions of public statutes, and were to be paid out by him for certain purposes to which they were appropriated by law, and this without the county council concerning themselves in the matter one way or the other.

It is not pretended that any of these payments, for which the plaintiffs are now claiming as having been made by them for the use of *the municipality and at their request*, were really made at the request of the municipality. They were not sensible that the aid of the plaintiffs, or of any one, could be required for making such payments, for they had every reason to believe that their treasurer had ample funds of theirs in his hands, out of which he was bound to pay these claims, without any direction from them, and in the discharge of the public duty which the law imposed upon him.

Then, if it cannot be said that there was any express request from the municipality to make the payment, can a request be implied under the circumstances? I think none can be, for the municipal council, which represents the municipality, would have been violating the law in making such a request, and it would be contrary to legal principles therefore that we should infer it. They would have been contracting a debt to the bank to the amount of £7,000 and upwards, not only without the authority of law, but in direct opposition to express statutes. They would have had no authority to raise the money upon the people of the county for reimbursing the bank.

It has been urged (and this indeed is putting the plaintiffs' claim in the most favourable light that it can be placed in) that by those payments which the treasurer has entered in the bank-book kept by him, and has given credit for to the bank as in account with the county of Middlesex, the creditors of the county have been satisfied their respective claims, and that the county have thus, by the funds of the bank, been relieved from payments which they must otherwise have made from county funds; and that the municipality cannot hold themselves acquitted towards their creditors by such payments without adopting them, made as they were

with the money of the bank. But is it quite correct to say that the plaintiffs made the payments? The sums were paid, according to the treasurer's account, out of their money, but paid in that manner by himself as treasurer, without the privity of the municipality, and with a perfect knowledge on his part that he had before misapplied the funds of the county with which he ought to have made payments, and was misapplying the funds of the bank, without its knowledge, to make up the deficiencies.

We have no ground for speaking of adoption of any payments by the county. The several creditors having been satisfied their claims against the county, have, of course, urged no claim, that we know of, to be paid again. The municipality therefore cannot have been called upon to determine whether it will or will not adopt the payments. They are simply passive, for all they know is, that their money which ought to have been paid to their creditors in satisfaction of their demands, would have discharged them all, and that the treasurer had no sanction from them to apply it otherwise. What has become of their money, and with what funds the payments were in fact made, they know not: they only see the account which the treasurer has given of the matter, and that is not such as can be expected to satisfy them that the whole or a part of the payments which the plaintiffs claim to have been made was not in effect made out of the funds of the county of Middlesex.

Throughout the whole period, the treasurer, as has been proved, ought to have had a considerable surplus of county money in the treasury, but he admits that he is in arrear with the county more than £7,000, and that if the plaintiffs succeed in recovering back those payments, for which he has taken credit to himself in his account as treasurer with the county, he will then be nearly £15,000 in their debt. He was not pressed to account for this deficiency. He does not pretend that he has lost the money by any casualty. Something was said of his having been concerned with others in speculations in land; but the witness who spoke of this stated that he did not think he had paid on account of such speculations more than £800. It does not seem probable,

and the defendants, I dare say, do not feel satisfied that the whole of this large sum spoken of was abstracted from the treasury and misapplied between June and October, 1857. How can the defendants tell, and how can we tell, that the treasurer, being also agent for the bank, and having his own funds as treasurer, and the money of the bank for several years equally under his control, may not have misapplied from time to time the moneys of the bank, to which he admits himself to be now in default, and that when his deficiency in regard to those funds has accumulated, so as to make it press inconveniently in regard to the business of the bank which he had to carry on, he may not have made up such deficiency for the time from the county funds lying in his hands, and then as demands for small sums came against the county from individuals, have paid such demands from the moneys of the bank which he had transferred to it from the county treasury. In that case, the payments in question would in effect have been made from county funds.

But for determining this case it seems to me sufficient to consider that the defendants had not, to their knowledge, any account with the plaintiffs, and exercised no control over the treasurer as to the place in which he should keep his funds: that there is no evidence that they ever desired or expected the plaintiffs to make such payments on their account as they are claiming for in this action, or that there was any course of dealing between the bank and the municipality of that nature from which a sanction could be inferred. But if the president and directors of the bank, knowing of the embarrassment of the treasurer, had themselves at his request placed at his disposal their funds in order to replace the funds of the county which he had misapplied, they could not have recovered such moneys against the county, for no one can at his pleasure make another his debtor without his consent or privity. And the fact is that the agent of the bank who made these payments knew all the facts, and therefore knew that he was not *bona fide* in advancing the money on behalf of the bank for the purposes of the county, and relying on the county for repayment; but he was, with-

out the knowledge of the bank, diverting their funds to purposes of his own—that is, to making up his own deficiencies—and not relying upon the county for recognising the payments as advances made by the bank on their behalf.

I think the case is clearly one in which the plaintiffs cannot recover, and that the verdict rendered at the trial for the defendants must stand, for I take the law to be as it was clearly laid down by *Baron Hullock*, in the case cited by Mr. Elliott, of *Tappin v. Broster* (1 C. & P. 112), when he said that “he conceived no action for money paid could ever be maintained unless there was evidence that the money was paid, *not only for the defendant's benefit, but by his authority.*”

The present is in some of its circumstances an unusual case, but we may take one of a more ordinary character that will illustrate the principle which must govern it. If A. should send a clerk or servant with money to make a purchase for him, who, instead of paying for the goods as he ought to have done with the money given to him, should spend that money for some purpose of his own, and should afterwards borrow money from a friend to pay for the goods, the person lending the money would surely have no right of action against him for whom the goods were purchased.

The fair way, I think, in which to look upon the transaction now under our consideration is, that the money was not money in any sense paid for or lent to the county by the bank, but was money of the bank which their agent improperly took upon himself, without their privity, to lend to himself, in order to replace the funds of the county, which he had without the sanction or knowledge of the municipality appropriated to purposes of his own. If the treasurer, when he made the first of the payments now in question from the moneys of the bank, had, instead of doing so, gone to the municipal council, and requested their permission to borrow the sum from the bank, because he had misspent the money of the county, would they have authorised it? We cannot suppose they would. They would more

probably have said that he must immediately find the money himself, or they would look to his sureties. And how can the treasurer have placed the municipality in a worse situation by letting them know nothing of the matter, and making, without the knowledge of the bank any more than of the municipality, just such arrangements between the two funds as suited himself.

Again, if the treasurer, when he was deficient in his accounts with the municipality, had applied to the bank, whose agent he was, telling them how he stood, and asking them to be allowed to make payment as treasurer out of the bank money without making the county council aware that he was not paying the charges against the county out of its own funds, could they have understood any thing else from this request than that he was asking them to make *him* an advance *on his own credit*, to enable him to cover for the time his own deficiencies? And could they have contemplated that for any money they might have agreed to let him have upon such a request they could look to the county for reimbursement? Surely not! Then how can the treasurer, who knew all the facts, throw a liability upon the county by merely using the money of the bank without their permission or knowledge, without any authority from the county to borrow, or any authority from bank to lend?

McLEAN, J.—Amongst the payments made by the treasurer were coupons attached to debentures of the county of Middlesex to a very considerable amount, and the plaintiffs contend that these being paid with their funds by their agent became their property, and that they are entitled at all events to recover their value.

As to the moneys paid for other purposes, without request from the defendants, or any one authorised by them, it is, I think, clear the plaintiffs cannot recover. The plaintiffs could not make the defendants their debtors without their consent, and the treasurer had no authority to contract any debt for which the county would be liable.

As to the coupons, they must be assumed to have come into the hands of the treasurer as treasurer, and not as agent

of the Gore Bank, and his choosing to mark any of them as paid by the Gore Bank could not make the defendants liable, without any knowledge on their part that he had so marked them till they were delivered over by him and charged to the county as paid by their treasurer. But none of the coupons paid since the 1st of July, 1857—and the plaintiff's account is wholly since that date—are so marked, and there is nothing on the face of them to shew that they ever were held by or deposited in the bank, or that in truth the bank ever had any claim upon them. These coupons were handed over with the other coupons to the defendants, and charged against the county funds in the hands of the treasurer; and the fact of their having been improperly paid by him from the bank moneys cannot affect the liability of defendants. It was a misapplication of the plaintiff's funds for the payment of demands which he had received moneys of the defendants to discharge. By this misapplication the treasurer was for the time relieving himself from an embarrassment occasioned by his having used the funds with which the defendants had supplied him.

BURNS, J., concurred.

Rule discharged.

JAMES RICHARD MANDEVILLE V. NICHOLL.

Omission to register will—Infancy of devisee—Confession given by executors before probate—Sale of lands thereon.

M. devised the land in question to his two sons, John and James. He died in 1834, and his will was not registered until 1852, soon after James came of age, the title having been a registered one since 1833. In 1850 John, who was the eldest son and heir at law of the testator, conveyed the south half of the land to defendant, who registered his deed in the same year. In 1836 the other half was sold to defendant under an execution against the executors obtained on their confession.

Hehl, that defendant was entitled to the whole; for as to the south half, the deed by the heir at law must prevail, the infancy of James being no excuse for not registering the will; and as to the north half, that the court could not go behind the judgment, even if there was anything to impeach it, which did not appear: that it was no objection that the writ against goods had not been returned before the *fi. fa.* lands issued, nor that the executors had not proved the will, for by confessing judgment they accepted the office.

McLeod v. Truax, 5 O. S. 455, considered and approved of.

EJECTMENT for the west half of lot No. 39 north on the Talbot road east, in the township of Southwold.

At the trial, at St. Thomas, before *Richards, J.*, it appeared that the plaintiff claimed under the following title:

It was admitted that Richard Mandeville, his father, died seized of this half lot. He made a will on the 21st of March, 1834, and devised it to his sons, John Mandeville, and James, the plaintiff, "to be divided equally between them when they become of age:" and directed by his will that his wife, Anna Mandeville, should "have the use of this property, or her living out of the same, as long as she should remain his widow." And he appointed Garrett Smith, Abraham Mandeville, and his wife Anna, executors and executrix of his will.

The testator died in March or April, 1834. His will was registered in the county registry on the 20th of August, 1852.

John Mandeville was the testator's eldest son. He died in March, 1856, without issue, and intestate. The widow of Richard Mandeville, his father, died in 1839.

Richard Mandeville, besides his two sons, left three daughters, Sarah, Jane, and Margaret, now married; and, on the 18th of October, 1856, they joined with their husbands in conveying the half lot in question (one hundred acres) to the plaintiff. This deed was unregistered.

The title to this land was admitted to have been a registered title from the 20th of October, 1833.

For the defence, it was proved that on the 30th of October, 1850, John Mandeville conveyed by bargain and sale, for a consideration expressed of £175, the south half of this 100 acres to the defendant Nicholl; and this deed was recorded on the 31st of October, 1850.

On the 17th of March, 1836, a judgment was obtained by James Hamilton, in the district court of the District of London, against the executors and executrix of Richard Mandeville, on their confession, for £40 damages, and £2 13s. costs, under which, on a writ of *fi. fa.* against lands of the testator, issued on the 1st of November, 1837, returnable on the 1st of December, 1838, and directed to the coroner, the plaintiff Hamilton being sheriff of the district, the north half of these 100 acres was sold to the defendant, and conveyed to him by the coroner.

John Mandeville was born in 1829. The plaintiff James was born in 1831.

On the 19th of August, 1852, the plaintiff, having then very lately come of age, obtained the will from one of the executors, and got it recorded in the county register.

The defendant Nicholl was called by the plaintiff. He admitted that he had heard before he took his deed that Richard Mandeville had made a will, and that it was lost. He swore that John told him he was the heir at law, and that if there was anything wrong about it he would make it right, and that he took a bond from John to indemnify him against any claim of James. He swore also that the purchase was made *bona fide*, and that he paid the whole amount in cash.

A verdict was given for the plaintiff for the hundred acres, subject to the opinion of the court.

McMichael, for the plaintiff, cited 35 Geo. III., ch. 5, sec. 2; *Graham v. Nelson*, 6 C. P. 280; *Wrathwell v. Bates*, 15 U. C. R. 391.

Crombie, for defendant, cited *McLeod v. Truax*, 5 O. S. 455; *Doe Spafford v. Brown*, 3 O. S. 90; *Doe Jessup v. Bartlet*, 3 O. S. 206; *Mitchell v. Greenwood*, 3 C. P. 465.

ROBINSON, C. J., delivered the judgment of the court.

We have no evidence or admission of any partition having been made between the devisees, John and James Mandeville. John, therefore, when he conveyed the south half of the 100 acres to this defendant in 1850, and thus assumed to grant the entire interest in that specific part of the land devised to him and his brother, attempted to convey what he could not convey as devisee of his father, for his deed could only operate to transfer its undivided moiety in the south part. The other undivided interest, for anything that is stated in the case, or was proved on the trial, would be still in the plaintiff James, if it were not that by reason of the registry of John's deed to the defendant while the will of his father was still unregistered, the title given by John as heir at law prevails over the devise, for the title to the 100 acres is admitted to have been a registered title before the

will was made, and the will remained for about sixteen years unregistered after the testator's death.

The decision of this court in *McLeod v. Truax* (5 O. S. 455) is of course binding upon us, and it is unnecessary to repeat the reasons which were given for that judgment. Until it is overruled by a higher court we must take it to have settled that the infancy of a devisee is not to be recognised as an impediment that will excuse the want of registry. I have in this case, however, examined the grounds of that judgment, and upon a comparison of the provisions of our statute with the English Registry Acts that are referred to in the judgment, I think that case was rightly decided. It follows then that John Mandeville, the heir, having conveyed the south half of the 100 acres to the defendant before the will was registered, and his deed having been registered before the will, the defendant is the owner of that portion of the 100 acres; for I think we cannot hold upon the evidence that Nicholl was not a purchaser from the heir for a valuable consideration, or that, if he knew of the will (which is not shewn) it would make any difference in the effect of the prior registry of the deed.

The verdict, as regards the south half, therefore, should be entered, I think, for the defendant Nicholl.

Then as to the north fifty acres of the 100, if there had been no sheriff's sale under an execution against the executors of Richard Mandeville, that would have gone in undivided moieties to John and James under the will, because the title in that half under the will was not displaced by any conveyance made by the heir before the will was registered.

But it could only pass under the will subject to the claims of creditors, and this portion having been sold to the defendant Nicholl under the judgment and execution against the executors, it also became his, unless there is some fatal defect in his title so derived.

The judgment obtained in 1836 against the executors is regular on the face of it. We cannot go behind it at this distance of time, or at any time, in order to see whether it was not a judgment given upon something that did not warrant its being entered in the terms in which it stands.

It imports, in the strong language of Lord Ellenborough, incontrovertible verity, being the judgment of a court of record, and an execution issued in accordance with it must be held to be supported by it. But indeed there really is nothing to impeach the judgment. The confession was given in the action against the executors, and is necessarily a confession by them in that capacity in which they were sued, whether they added the words "as executors," or signed their names with that addition, or not. Moreover, the title of a purchaser under a valid writ is not so liable to be defeated by going back to the *cognovit*, or other foundation on which the judgment rested.

The objection that the writ of *fi. fa.* against goods appears not to have been returned before the execution issued against lands, we must hold to be immaterial, upon the authority of the judgment given in this court in *Doe dem. Spafford v. Brown* (3 O. S. 90), cited in the argument.

Then it remains to be considered that the executors, as it it stated, had not proved the will, and so it is urged that they could not confess judgment, and thereby warrant a judgment and execution against them under which the lands of the deceased could legally be sold.

But I take this objection to be unfounded. These executors appointed by the will were not executors of their own wrong, who intruded themselves into the office. An executor *de son tort* is one who, being neither executor nor administrator, intermeddles with the goods of the deceased. These were rightful executors, and by confessing judgment in an action brought against them in that capacity they accepted the office; and Mr. Williams, in his treatise on executors, page 165, states that "if the executor have elected to administer, he may before probate be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible."

The conveyance made to the plaintiff by his sisters in 1856 could only have been made under the title which it may have been supposed they derived from their brother John, who had died in that year intestate and without issue;

but John Mandeville had divested himself, by his conveyance made in 1850, of the south half of the 100 acres, and the sale made under the execution against their father's executors had divested his title to the north half.

So that it appears to us the defendant must have a verdict for the whole premises claimed.

Judgment for defendant.

DARCH V. MCLEOD.

Use and occupation—Lease outstanding—Evidence of substitution of tenants.

In an action for use and occupation, it appeared that F. held a lease of the premises from the plaintiff, where he kept a shop. He assigned all his stock in trade to defendant, who took possession, and he or his brother paid the plaintiff one quarter's rent, and his son swore also, that before the next quarter fell due defendant's brother said to the plaintiff, "we have paid for the last quarter's rent, and I suppose we must pay for this quarter." The lease was in existence during the time for which the plaintiff claimed.

Held, that it was properly left for the jury to say whether there was a substitution of defendant as tenant in place of F., and that they were justified in finding for the plaintiff.

APPEAL from the County Court of the County of Middlesex.

This was an action for use and occupation of certain premises in the city of London.

A verdict of £50 was rendered for the plaintiff at the trial, with leave reserved to move to enter a nonsuit.

In the following term the defendant obtained a rule calling on the plaintiff to shew cause why the said verdict should not be set aside, and a nonsuit entered pursuant to leave reserved, upon the ground that the evidence at the trial established as a fact that during the time the defendant occupied the premises there was a lease outstanding and unexpired from the plaintiff to one Andrew Fraser, which had never been assigned to the defendant, or surrendered by the said Fraser, until long after the defendant had ceased to occupy the said premises, the said surrender having then been made between the plaintiff and the said Fraser, and on the ground that the said lease not having been assigned or surrendered, no action could be maintained by the plaintiff against the defendant for rent of the premises accruing while the lease was so outstanding and not surrendered by

the said Fraser, either for the rent or for use and occupation.

This rule was discharged in the court below, and the defendant appealed.

It appeared from the evidence returned that one Fraser held a lease of these premises from the plaintiff Darch, but whether under seal or not was not stated.

Being in debt to the defendant, he assigned to him all his stock in trade. He had kept a shop on the premises. When he made the assignment the term was yet unexpired. The assignment which he did make was not produced, but a witness stated verbally that "it included all that Fraser had," and that Fraser was yet in McLeod's debt.

Another witness swore that when the defendant McLeod took possession of the goods, he was to hold possession of the premises till he had disposed of the goods, and he put a clerk or agent in possession, and afterwards his brother.

After the defendant had been in possession for some time, by himself or his agents, he or his brother paid the plaintiff one quarter's rent, which had fallen due in September, 1856, according to the lease to Fraser, and on the 15th of December, 1856, another quarter's rent became due, and a son of the plaintiff swore that while the quarter's rent was still current, the defendant's brother said to the plaintiff, "we have paid you the last quarter's rent, and I suppose we must pay you this quarter."

When Fraser sold out his stock to the defendant his sign was taken down, and defendant's sign put up in its place.

The defendant's son swore also that before the December quarter had ended, he went with the plaintiff to the shop, and the defendant's agent, Charles McLeod, asked the plaintiff to buy the fixtures, which the plaintiff declined.

Fraser continued on the premises as clerk to the defendant.

It was admitted that the lease to Fraser was surrendered on the 12th of January, 1857.

This was the evidence on the part of the plaintiff. The defendant moved for a nonsuit, on the ground that the premises being under lease to Fraser at the time for which

compensation was demanded, there was no privity between the parties to support this action for use and occupation.

The learned judge reserved the point, and allowed the case to proceed.

The defendant called his brother, Charles McLeod, who swore that he paid the rent due in September "for his brother, on account of Fraser." That he had settled with Fraser for the rent up to the time in December that defendant left the premises, and that the defendant credited Fraser in his book with the rent which fell due in December. He swore that he offered the key to the plaintiff, who refused to take it. He denied that he had promised the plaintiff in presence of his son to pay the rent for the quarter ending in December.

Prince, for the appellant, cited *Hyde v. Moakes*, 5 C. & P. 42; *Bull v. Sibbs*, 8 T. R. 327.

C. Robinson, contra, cited *Phipps v. Sculthorpe*, 1 B. & Al. 50; *Gudgen v. Besset*, 6 E. & B. 986; *Woodf. L. & T.* 242, 261; *Rosc. N. P.* 222.

ROBINSON, C. J., delivered the judgment of the court.

We understand from the learned judge's report, that he left it as a question to the jury whether there was a substitution of the defendant as tenant in place of the original lessee, and that the jury found there had been such substitution, and gave their verdict for the plaintiff for the rent claimed, £50.

We think on the plaintiff's evidence there was ground for leaving the case to the jury, as it was left.

If the defendant, having bought out Fraser, was recognised by the plaintiff as tenant, and paid rent to him as his landlord, the law would prevent him from disputing the plaintiff's right to let him into the place. On that point, the case of *Phipps v. Sculthorpe* (1 B. & Al. 50) is a clear authority. If, on the other hand, the defendant, without any arrangement or understanding of that kind with the plaintiff, merely continued to occupy after he bought out Fraser, then undoubtedly the case of *Hyde v. Moakes* (5 C. & P. 42) would apply in defendant's favour.

It was for the jury to determine, for it cannot be said that there was no ground for taking the case to be such as the plaintiff contended it was. The weight of evidence would rather have brought us to the conclusion, we think, that the defendant merely went in under Fraser's lease to suit his own convenience, and not upon any arrangement with the plaintiff.

But the jury may have doubted the testimony of Charles McLeod, that he paid the rent to the plaintiff on Fraser's account, and probably believed it to be an unfair attempt on defendant's part to evade payment to the plaintiff by crediting his insolvent debtor, Fraser, with the amount. They saw that defendant had paid the previous quarter's rent to the plaintiff, and that the lease was formally surrendered a few days after.

We think the verdict was probably just, and that we are not called on to disturb it. The appeal should, in our opinion, be dismissed, with costs.

Appeal dismissed.

THE QUEEN V. WILLIAM HAMBLY AND EDMUND HAMBLY.

Arson—Indictment against two—Slight evidence against one—His right to be called for the other—Or to have his case submitted separately:

Where no evidence appears against one of several prisoners, he ought to be acquitted at the close of the prosecutor's case.

Quære, whether without such formal acquittal he may be called as a witness for his co-prisoner. *Semble*, not, unless it appears that he has been joined in order to exclude his testimony.

It is in the discretion of the judge, at the close of the prosecution, to submit such prisoner's case separately to the jury; but he is not bound to do so, and whether he has rightly exercised his discretion or not, cannot be reserved as a point of law.

Held, that in this case it could not be said that there was no evidence against E. H., one of the prisoners, and *semble*, that under the circumstances he could not be called as a witness for the other.

Where points of law were reserved under the act, and the prisoner, besides relying upon them, moved for a new trial, the court refused to grant it, though the evidence was slight.

The prisoners were tried at Cobourg, before *Draper*, C. J., upon an indictment for burning a barn, the property of Jacob Nead, at Bowmanville, on the 8th of February, 1858. The following is the case as reserved by the learned Chief Justice for the opinion of this court :

Jacob Nead, sworn.—I live in Bowmanville, and am a merchant. I owned a barn in that town, about half a mile from my house. The barn was nearest to the Manvers road, of any road. There were ten or twelve tons of hay, twelve acres of clover seed unthrashed, and thirty or forty bushels of peas unthrashed, in the barn. I know the prisoners. I had a claim against William Hambly on two notes, on which I got judgment and execution, and there was a levy and sale of his property. There were other executions besides mine. The sale was on the 8th of February last. I keep a store. William Hambly was in my store about 6 p. m. on the 8th of February. The sale was spoken of. He asked me who bought the waggon. I asked where his horses and carriage were; he told me. Thomas Coleman then came in. He is the bailiff who had the executions, which were not all satisfied, and I told him where the horses, &c., were, that he might take them. William Hambly began swearing. I ordered him out, and he was very excited, and near the door he used some threat. I was excited. I do not remember the words he used. I think he had been drinking. About half-past nine the same evening I heard the alarm of fire, and I went out and found it was my barn. I did not go up to it: there was no chance of saving it: it was all in flames. I directly suspected the prisoner Wm. Hambly, and I said so openly. I went back to consult with the mayor and others. We concluded to wait until next morning. Next morning about 7, I went with Thomas Coleman and Stephen Chesterfield. We found tracks and followed them. The first I noticed were about eight rods from the barn. The snow round the barn was melted. I called on Coleman and Chesterfield to trace these tracks; they led towards Mr. Odell's woods and through them into his (Odell's) wheatfield, and thence to William Hambly's fence. Coleman left me there and went on to arrest the prisoner, who, as he thought, was coming out of his own house as if going away somewhere. They were tracks of shoe-packs and square-toed boots, tracks of two persons as if going together. The fire was on Monday evening. My teamster had been there on the preceding Saturday, not after to my knowledge. *Cross-examined*:—The prisoner Wm. Hambly is much addicted to drink. He did own the farm he lives on, and still owns part; he has lived there fourteen or fifteen years. The prisoner Edmund lives in Bowmanville. No one was in the habit of going to my barn but the teamster. The fire had melted the snow around the barn two rods. There was a good many foot marks of persons around the barn, persons who had

been at the fire. The prisoner's house is about two hundred yards from his barn. There is a lane between the prisoner's house and his barn. I stopped tracing the footmarks to within about sixty rods of the prisoner's house. I left the constable to trace further. I could see steps going further. I saw at once the marks were a shoe-pack or moccassin, and a boot. A shoe-pack has no sole or pack, nor any heel. Shoe-packs are commonly worn. The two tracks were a short distance apart. The snow was from four to six inches deep, and soft. *Re-examined*:—Chesterfield followed the tracks across Hambly's land from the fence. As soon as I saw the tracks I was satisfied they were those of one person wearing boots, the other wearing moccassins or shoe-packs. They were tracks both going and returning.

Charles S. Bates, sworn.—I am a merchant in Bowmanville. I remember the fire. I saw the prisoner William at Nead's at 6 that evening. I heard the conversation between the prisoner William and Nead. The prisoner used some threatening language, and was violent in his manner. He was considerably intoxicated. *Cross-examined*:—It was after Coleman came in that the prisoner William got violent. I have known him for years. He is much addicted to drink.

Thomas Knox, sworn.—I am Nead's clerk, and was in the store that evening when the prisoner Wm. Hambly was there; heard the conversation. As the prisoner went out he said Mr. Nead would be sorry for what he had done.

Thomas Coleman, sworn.—I am the bailiff spoken of, and had the executions mentioned by Nead. Was in Nead's store on the evening spoken of just before the prisoner William left. The threats spoken of were not directed to me but to Nead. I saw the fire at a distance that evening. I went with Nead and Chesterfield the next morning. Saw tracks a short distance, perhaps three rods west from the barn, where the melting of the snow had ceased. Tracks of two persons going north-west from the barn in the direction of the prisoner William's place. I traced them to within twenty-five or thirty rods from his house (looks at a plan.) This is a correct delineation of the grounds, &c., and where I traced these foot tracks of two persons going and coming. There was a large basswood log: one of the foot tracks went to that. At a fence near that I saw marks, as if a person had leaned on it, one of the tracks was made by shoe-packs or moccassins, the other by boots; Chesterfield was a little in advance of me and Nead. When I got within 25 rods of the prisoner's house, observing a person leaving his house I went at once after him; it was not the prisoner, but I ar-

rested him soon after on the Scugog road, near his house ; he had a pair of shoepacks on which he said he had worn some time. I arrested Edmund Hambly also, he had boots on. I told William Hambly why he was arrested, he said he was not the party, could we prove it ? he made very light of it : he said he was standing at his own stable door when he saw the fire ; he said he was not at the fire : he said that if he had been, and a hatful of water would have put it out, he would not have thrown it on : he said he was glad of the fire. We took one shoepack off William Hambly's foot, and took also one of William Hambly's boots ; no snow had fallen of consequence since the fire ; we took a small pair of bellows to blow any light snow off ; we made impressions of the shoepack and boot beside the tracks ; they closely resembled each other ; the shoepack was ripped a little in the heel in the seam, and the new impression made by it seemed the same as the old track which I had traced : putting the shoepack and the boot into the respective tracks they seemed to fit ; we made two or three impressions, and examined perhaps ten or a dozen of the old tracks ; the boot and the moccasin fitted the respective tracks we had traced. The snow in parts was four inches deep, in other parts perhaps a foot deep. *Cross-examined* :—I found tracks of other persons leading to and from the fire, a number of tracks, which I did not trace, straighter than these two tracks, as if the parties had gone more directly to the fire ; I traced some a short distance. There were several tracks going from the Manvers road, I tried the boot and shoepack only on the tracks I traced to the prisoners. There were other tracks going from the little lane towards the burnt barn : shoepacks are commonly worn in that neighborhood ; the boot or shoepack was only put in the tracks by hand, not on any one's foot. *Re-examined* :—There was no other shoepack track that I noticed.

Stephen Chesterfield, sworn.—I was there with Coleman the morning after the fire, and saw the tracks he mentions ; I took notice of the moccasin, for though common enough in the back country they are not so common in Bowmanville, (points out on the map where he traced them,) I traced them right up to a little lane that leads from Hambly's barn, there they were effaced or mixed with others : these tracks seemed to be made by parties walking deliberately ; on the top of the snow was a light crust, and underneath the snow was impressed with the shape of the foot, which broke through the crust ; some impressions were quite clear, and I could even see the marks of nails of the boot. *Cross-examined* :—The little lane is a private lane on the

prisoner's land ; I traced the track into that lane and then I could trace no further. It was between 8 and 9 next morning I examined with the boot and shoepack. I had suspicions of the prisoners.

William Williams, sworn.—I know the prisoner well, and I remember this fire : that evening I was at his house ; I found him going home on the Scugog road, a quarter of a mile from the village, near the four corners, with another man, about half-past eight in the evening. They were going home, or towards his home ; I do not know the other prisoner. The prisoner William was stopping in the road, driving a single sleigh, the other person was standing in the road. I had left William Hambly's house before I met him. I got home about nine o'clock, I did not hear of the fire till next morning. *Cross-examined* :—I saw the prisoner Edmund after the fire, when before the magistrate.

Andrew Knox, sworn.—I am Nead's teamster : I was at the barn the Saturday before the fire : I do not know of any person going afterwards.

Thomas Ward, sworn.—I live about thirty rods north of the Manvers road : I remember the fire ; I was at the fire ; one man was there before me, Nicholas Morsey : I saw the barn burnt, it burnt quickly.

DEFENCE.

Mr. Cameron claims Edmund Hambly's discharge as a matter of right on the ground that there is no evidence against him. I think I am bound to say there is some evidence, though of its sufficiency the jury must judge, in the correspondence of the track found with his boot, and the evidence goes strongly to shew the other track to be William Hambly's and therefore I decline to direct his acquittal at this stage. The object stated is to make him a witness for the prisoner William. On my overruling this *Mr. Cameron* asks to have Edmund's case submitted alone to the jury before other's. I decline this also. The prisoners might have severed in their challenges.

Nicholas Morsey, sworn.—I was at the fire, the first person ; I looked at once for tracks, *Mr. Harvey* and son, *Brown*, and *Wood*, came ; I found new tracks leading from the Manvers road around the barn, and back again to the road. A great many people came through the gap of the fence (shewn in the map). I came from the Scugog road. I did not discover the tracks mentioned by *Coleman* ; if they had been there when I searched I think I must have seen them : I searched round before the people came up. I have known the prisoners

seven or eight years, good characters except that William drinks. A great many people were at the fire. *Cross-examined* :—I did not see either prisoner that night at the fire or elsewhere ; I saw them at the lock-up after they were arrested. Very few words passed about the fire. It was relative to my bailing them we talked. Edmund could not miss of seeing the fire ; about all he said was it would be a very unlikely thing he would do it : I heard him say he was with the other prisoner the evening of the fire ; I did not understand they were up at William's house.

Thomas Belman, sworn.—I live north of the prisoner William ; I was at the fire ; I came into the lane spoken of ; Walter Pethick was with me ; we crossed the fence and went through the wood, and returned the same way just where the witnesses Coleman, Chesterfield, and Nead have described ; I saw no sign of a track then over that ground ; I am sure that in one part there was no track but our own. I have lived there twenty-six years ; I have known the prisoners many years excellent characters, except that William drinks. *Cross-examined* :—I, Walter Pethick, and my little boy went together ; I had boots on, and so had Walter Pethick I think ; there was deep snow in parts ; I came to the barn at the north-west corner ; we then returned together ; we went into Hambly's field, and just through the corner of Foster's ; we returned more to the west.

Walter Pethick, sworn.—I was with the last witness as he describes across the fields ; I had boots on ; I never observed or saw any track whatever as we went ; the fire gave us plenty of light all the way ; the way we went is as near as I can understand the way described by Coleman and the others. *Cross-examined* :—The boy was with us, and we walked fast ; we went back in another direction across a field of Mr. Odell's.

The jury convicted both prisoners, recommending them to mercy. I did not anticipate this verdict, principally because the evidence of Thomas Belman and Walter Pethick was such that I thought the jury might very probably have availed themselves of, as raising a reasonable doubt, if they felt otherwise any hesitation at conviction. I drew their attention particularly to the fact that as to William Hambly the evidence was that the shoe-pack, its peculiarity from a rip in the seam running round the heel, his conversation with Nead before the fire, his remarks after the fire, the sale of part of his property, and the expectation of his horses, &c., being found and seized for further satisfaction of the debts, as affording evidence of motives and ill feeling to-

wards Nead, and (if the tracks were certainly his) of his having been near the barn as far as could be traced through the snow, though he denied having been there at all, summing up by saying that unless quite satisfied the shoe-pack tracks were his, there was not sufficient evidence to convict; and, as to the other prisoner, the absence of evidence as to motive and ill-will to Nead was pointed out—that the evidence for the Crown as to him was confined to the boot track apparently made by a person going with the one who made the shoe-pack track; though this evidence, so far as it proved the two prisoners to have been together that evening, was confirmed by the evidence of Nicholas Morsey of Edmund Hambly's declaration that on the evening of the fire he was with his brother William. In applying to me to have Edmund acquitted, and in his address to the jury, Mr. Cameron had stated his desire to call Edmund to prove where he and the other prisoner were on the night of the fire, but in my charge I made no allusion to this. I threw out for the consideration of the jury that even if satisfied the feet were those of the two prisoners it was *possible* they might have gone to the fire after it was over as well as before, as these tracks were not discovered until next morning.

Having some doubt whether I ought not to have submitted Edmund's case separately to the jury as requested I did not pass sentence, and reserved the following questions, on which I request the opinion of Her Majesty's Court of Queen's Bench:

1. Whether, as a matter of right, the prisoner William Hambly could claim that for his benefit the jury should first be charged with the case of the other prisoner, who assented.

2. Whether, on the close of the case for the Crown, I ought to have directed that Edmund Hambly was entitled to be acquitted.

In addition to relying upon the questions reserved, *Cameron, Q. C.*, obtained a rule *nisi* for a new trial on the evidence.

R. A. Harrison, for the Crown, cited *Regina v. Owen*, 9 C. & P. 83; *Regina v. Gerber*, Temp. & Mew 647; *Regina v. Smith*, 1 Mco. Cr. C. 289; *Regina v. Hood*, Ib. 281; *Regina v. Hinks*, 2 C. & K. 462.

Cameron, Q. C., contra, cited *Regina v. Clothier*, 1 Cox C. C. 113; *Regina v. Stewart*, Ib. 174; *Regina v. Moore*, Ib. 59; *Regina v. Williams*, Ib. 289; *Regina v. King*, Ib. 232.

ROBINSON, C. J., delivered the judgment of the court.

This comes before us upon points reserved by the learned judge at the trial, under the statute 14 & 15 Vic., ch. 13, and also on an application to us by the prisoners for a new trial.

We must confine ourselves to the points submitted to us, and determine those by the law in force here, and not as modified by English statutes of late date, which are not binding in Upper Canada, and the provisions of which we have not adopted.

Unless our statute 16 Vic., ch. 19, affects these questions, I know nothing that would warrant our determining either of them differently now from what we should have done at any time after we adopted the Criminal Law of England, as it stood in 1792. And we do not find that the statute we have mentioned does affect the questions referred to us, namely—first, whether William Hambly could claim as a matter of right, for his benefit, that the jury should first be charged with the case of the other prisoner, who assented to that course; and, secondly, whether at the close of the case for the Crown, the learned Chief Justice ought to have directed that Edmund Hambly was entitled to be acquitted.

And upon these questions we consider that at common law, in criminal cases as well as in civil, a co-defendant against whom no evidence whatever is given, ought to be acquitted at the end of the prosecutor's or plaintiff's case, if he may not be called as a witness for his co-defendant even without such formal acquittal, as to which we refer to what is said in Buller's *Nisi Prius*, 285, which ought, we suppose, to be confined to cases in which, as is there expressed, a person has been arbitrarily made a defendant in order to exclude his testimony.

In the case before us, we think the learned judge would not have been warranted in concluding that Edmund Hambly had been made a defendant with any such view, nor would he, we think, have been warranted in holding that there was no evidence to be submitted to the jury as regarded Edmund Hambly, though he rightly intimated to the jury that the evidence was by no means such as it would be

safe and proper to convict upon. Still less can we properly presume that there was no evidence against Edmund Hambly, where there not only was some evidence to charge him, but such evidence as convinced the jury of his guilt. Then there being some evidence, though extremely slight, as we think, to charge Edmund Hambly; it was necessary that it should be submitted to the jury. In Mr. Chitty's treatise on the Criminal Law, Vol. I, page 627, his deduction from the authorities cited by him is—that if any, even the least, evidence be given against a defendant, he cannot be sworn in favor of his associates, “but the whole must be submitted together to the jury.” If he meant by this that the case against all the defendants must be submitted at the same time, we think that is a doctrine which may be questioned; but we take it to be clear on the authorities that if the judge could in his discretion submit separately to the jury, at the end of the evidence for the prosecution, the case of one of the defendants against whom only a shadow of evidence had been given, still he is not bound to do so, but has a discretion to exercise; and that being so, we cannot pronounce upon the question how he ought to have exercised his discretion, as if it were a point of law reserved under the act. Our opinion is that William Hambly could not claim as a matter of right that for his benefit the jury should first be charged with the case of the other prisoner, and that we cannot determine, as a legal question, that the judgment at the close of the case for the crown ought to have directed the acquittal of Edmund Hambly.

We must not be understood as expressing any opinion upon the course which it might have been proper to take at the trial, if the counsel for the defence, instead of applying to have Edmund Hambly's case immediately submitted to the jury, with a view to his acquittal, had, while he was upon his trial, proposed to call him as a witness for his co-defendant as a matter of right, and without reference to the consideration whether any legal evidence had or had not been given against him, which is not a question before us. It was to that point that the authorities cited by Mr. Cameron chiefly applied.

A comparison of our statute, 16 Vic., ch. 19, with the imperial statute 14 & 15 Vic., ch. 99, as well as a reference to English decisions, will be necessary when such a question shall present itself here, and some obvious considerations will have to be weighed, which need not now be stated. At present it is not our opinion that the authorities referred to would have warranted such a course.

Our judgment is that the conviction was in point of law legal, though as regards the prisoner Edmund Hambly the testimony is so slight that the learned Chief Justice of the Common Pleas may probably think it right to make some report of the case to the executive government.

This disposes of the points reserved by the learned Chief Justice for our decision.

The rule for a new trial that has been obtained in this case might, in our discretion, as we suppose, be made absolute, on the ground that the evidence is slight to sustain the conviction, but considering the nature of the charge, and the circumstance of a double course having been pursued in this case, which may be subject to objection, we decline to grant a new trial on the evidence.

Conviction affirmed.

CUMMINGS V. McLACHLAN.

Agreement to sell land—Liquidated damages or penalty—Uncertainty of description.

Where in a contract for the sale of land, it was agreed that in case either of the parties should retract, he "should pay to the other by way of ascertained and liquidated damages the sum of £100." *Held*, that such sum could not be treated as a penalty.

An agreement to sell and convey, or a deed of, "one acre of land, being part of the north-east quarter of lot 19, in the 7th concession of Darlington," is not void for uncertainty, but the purchaser may elect what acre he will have.

The declaration stated that the defendant, on the 21st of February, 1856, agreed in writing "to sell and convey to the plaintiff one acre of land, being a part of the north-east quarter of lot 19, in the 7th concession of Darlington, for the sum of £105," upon condition that the plaintiff should pay down in money £12 10s., and the remainder by annual instalments. And that "it was mutually agreed

between the plaintiff and defendant, that in case either of them should retract from the said agreement, the one so retracting should pay unto the other by way of ascertained and liquidating damages the sum of £100." The declaration then averred that the plaintiff then agreed with defendant to purchase on the terms aforesaid, and in pursuance of the agreement tendered to the defendant the £12 10s., which he was to pay down, and was always ready to receive the land, and to perform all conditions on his part, but that the defendant, after the tender of the money, refused to complete the said agreement, and retracted therefrom, and has since sold and conveyed the land to another person, whereby an action had accrued to the plaintiff to demand from defendant the sum of £100, &c.

A count was added on account stated.

The pleas were—1. Traversing the alleged agreement. 2. Denying that he agreed in writing. 3. *Nunquam indebitatus*.

At the trial, at Cobourg, before *Draper*, C. J., a verdict was given for the plaintiff for £100, no defence being made.

Hector Cameron moved for a new trial on the law and evidence, and for misdirection, and on affidavit of surprise, the cause being tried in the defendant's absence.

The misdirection complained of was, that the learned Chief Justice treated the £100 as liquidated damages and not as a penalty: that there was no proof of damage sustained; and that the agreement should have been held void for uncertainty in regard to the particular acre of land to be conveyed, and no evidence was given of the election by the plaintiff of a certain acre.

The agreement in writing was produced.

The affidavit stated that the cause was undefended at the trial, no one appearing there for defendant: that the defendant arrived about half an hour after the cause was tried; and the deponent, who was not concerned in any way in the case, swore that he was informed by the defendant's attorney that no payment was made by the plaintiff on the land purchased, nor buildings erected, nor improvements of any kind made, and that the plaintiff had sustained no damage whatever.

There was no affidavit made by the defendant or his attorney.

C.S. Patterson shewed cause, and cited *Reynolds v. Bridge* 6 E. & B. 528; *Plumer v. Simonton*, 16 U. C. R. 220; *Bac. Abr. "Grant"* H. 3; *Dy.* 281, note; *Hobson v. Blackburn*, 1 Myl. & K. 574; *Heyward's case*, 2 Rep. 37 *a*.

Hector Cameron, contra, cited *Atkyns v. Kinnier*, 4 Ex. 776; *Kemble v. Farren*, 6 Bing. 148.

ROBINSON, C. J., delivered the judgment of the court.

Besides the legal question raised, whether the £100 mentioned in the agreement should be taken as a penalty, or as liquidated damages to be recovered by agreement of the parties, without proof of damage sustained to that amount, the defendant has pressed for a new trial on his affidavits; but they really lay no ground; no excuse is assigned for the absence of the defendant's attorney, whose business it was to take care and be present, and what is sworn to is sworn not by the defendant or his attorney, but by a gentleman who was not concerned in any way in the case at the trial.

Besides, if the £100 must be taken as liquidated damages, the event of another trial must be the same as the last, for there is no intimation of any defence that is open to the defendant under his pleas.

Then as to the legal question. In our opinion the £100 must be treated in this case as liquidated damages, from which the jury were not at liberty to depart.

The agreement was not void for uncertainty in not specifying which one acre of the north-east quarter of the lot 19 the defendant was to sell to the plaintiff. The effect of no particular acre being stated would be to give to the purchaser the right to elect, and if the conveyance were made in the same general terms as the agreement, it would not be void for uncertainty, but the same effect would follow: the bargainee might elect. We refer to *Sheppard's Touchstone*, 250, 251; *Bacon's Abridgment*, "Grant," H. 3.

Upon the point of the £100 being not to be taken as a penalty, but as a sum agreed upon by the parties to be

paid by either that should retract, we refer to the cases of *Atkyns v. Kinnier* (4 Ex. 776), *Galsworthy v. Strutt* (1 Ex. 659), *Reynolds v. Bridge* (6 E. & B. 529), and to *Astley v. Weldon* (2 B. & P. 346), and the other earlier cases cited in those modern authorities. It is averred that the defendant has since the agreement sold the land to another person. This puts an end to all questions about election, for the defendant thereby disabled himself from conveying any acre, and for all that appears has deliberately and wilfully retracted without excuse.

If anything could have been set up as a defence that could have been admitted, the defendant should have shewn by affidavit that there was such defence, and the court would have relieved if it had seemed right to do so.

As to the £100 damages, it may operate hardly and may be unreasonable, but we have no right to say that it is certainly one or the other. The plaintiff, when he made this bargain, may have given up other places, or made arrangements in reliance on its being fulfilled, which may have occasioned him more damages than we might imagine, or than he could make out to the satisfaction of a jury, or could be allowed to recover for at law upon evidence of such damage, and so it might be on the other side; and both parties might, if they chose, agree to fix upon a certain sum which should not become short of or exceeded in case of retracting. And upon principles which have been long established, and are well understood, this appears to us to be a case in which either party can claim, if the other withdraws from his engagement, the precise sum that they both fixed upon as the measure of damages.

Rule discharged.

HENDERSON V. MCLEAN.

Purchaser from crown—Right of action against wrong-doer—Proof of possession—Effect of 16 Vic., ch. 159.

The plaintiff entered into an agreement for purchase of land from the crown. He had the lots surveyed, and paid persons to look after them for him, who had frequently entered and examined them, but the plaintiff had not entered upon the land himself, nor cultivated any portion of it. Defendant went upon the land and cut trees, for which he offered to settle with the plaintiff's agent, but he afterwards went to the local crown land agent, who was ignorant of the plaintiff's purchase, and got him to accept a sum of money, and give a receipt for it, as for timber cut on the same land.

Held, that the plaintiff's possession was sufficient to enable him to maintain trespass against defendant, and that the payment to the crown land agent formed no excuse.

Quære, whether as vendee he could recover substantial damages for the trees cut.

Held also, that the 16 Vic. ch. 159, by repealing the former acts, does not confine the right of action against wrong-doers to those who have obtained the license of occupation mentioned in the 6th clause; but leaves to other purchasers whatever right they may have at common law.

Henderson v. McLean, 8 C. P. 42, in part dissented from.

TRESPASS, *quære clausum fregit*, and cutting down and carrying away trees.

Pleas, 1st. Not guilty. 2nd. That the lands were not the property of the plaintiff.

The plaintiff complained of the defendant having gone upon his lots Nos. 20, in the 5th, 19 in the 6th, and 20 in the 7th concessions of the township of Sombra, and cut down oak trees for making staves.

At the trial, at Sarnia, before *Robinson, C. J.*, the evidence did not prove that the defendants or his men had cut down more than nine trees, which were valued by a witness at five dollars a tree, being suitable for staves.

It was objected that the plaintiff was not in a situation to sue for the trespass, not having the legal estate in the land, nor being in actual visible possession, and the title in the land being still in the crown.

The plaintiff had entered into a contract for the purchase from the crown of these lots, which were clergy reserves. In December, 1853, and September, 1854, he had paid instalments to the crown land agent, and produced his receipts for the payments. It was not shewn that he was in arrear for any instalments, but he had not received patents for any of the lots when the trespass was committed.

Hearing that such trespasses were being committed in the neighbourhood, he had had the lines run, and stakes planted on the lots Nos. 19 in the 6th, and 20, in the 7th concessions, in order to shew the boundaries, and that people might not pretend that they had trespassed by mistake.

The surveyor who did this was agent of the plaintiff, to look after these and other lands in that county, and there was also another person, named Johnson, whom the surveyor had authorized to look after these lands for him, and he had several times entered upon them and examined them, and had been paid for such services.

The plaintiff had not entered upon the lands himself, and had not by himself, or his tenants or servants, cultivated or cleared any portion of them. They were still wild lands. He did not shew that he held any license of occupation, such as is contemplated by the statute 16 Vic., ch. 159.

It was proved that it was well known in the neighbourhood that these lands belonged to the plaintiff (using the words in the popular sense), and that the defendant after cutting the timber went to the plaintiff's agent, Johnson, and wished to settle for the trees, alleging that he had cut upon the lots by mistake, though he did not own any land adjacent to them; but he afterwards went to the local crown land agent, and paid him a sum of money, and took his receipt for it as for duties paid by him to the crown on timber cut on the particular lots designated in the receipts as crown lands.

The learned Chief Justice told the jury, that in ordinary cases, where one man contracts to buy land from another and goes into possession, undertaking to pay for the land at a future day, the person so in possession is the equitable owner, and can sue for trespasses committed by strangers upon the land, and that in such case it was not necessary that the purchaser should actually reside upon the land, or place a tenant on it; though there might be a question in such cases whether the contracting purchaser could sue for the value of the timber cut and taken away from the land by trespassers, because, if he did not in the end make good his purchase, the vendor would receive back his land lessened in value by the loss of the timber, the value of which would

in the meantime have gone into the pocket of the vendee. He recommended the jury, however, in this case to assess the damages, and leave the question of the plaintiff's right to recover to be discussed by motion against the verdict. He told the jury that there would be a further question in this case arising from the fact that these were lands bought from the crown, in reference to which transactions there were certain statutes to be considered. And as to the defendant having gone to the crown land agent after the trespass, and paid him for timber cut on those lots, he remarked that that appeared to him to be a disingenuous attempt by the defendant to evade the payment of compensation to the plaintiff, after he had admitted his right and made an offer to settle, for that it could not be supposed that such timber duties had been received by the crown land agent, with a knowledge of the fact that the timber for which the defendant had voluntarily paid him was cut upon lands which the government had sold to the plaintiff, and upon which the plaintiff had been paying the instalments, without any default being shewn on his part.

The jury found for the defendant, explaining that they did so because the defendant had paid the crown land agent for the timber which he had cut.

Becher, Q. C., moved for a new trial on the law and evidence. He cited *Glover v. Walker*, 5 C. P. 478; *Harper v. Charlesworth*, 4 B. & C. 574; 16 Vic. ch. 159; 12 Vic., ch. 30; 4 & 5 Vic. ch. 100.

Prince shewed cause, and cited *Ward v. Andrews*, 5 Ch. Rep. 636.

ROBINSON, C. J., delivered the judgment of the court.

That an intruder on the possession of the crown may maintain trespass against a wrong-doer is established by the case of *Harper v. Charlesworth* (4 B. & C. 574) and by older authorities there cited. But the plaintiff in this case stands in one respect in a situation more favourable than an intruder, for although the legal estate is undoubtedly in the crown, yet he having contracted with the crown for the purchase of the land, and made payments on account of it, any

possession held by him was held with the knowledge and consent of the crown, and not wrongfully as an intruder. The only question is, whether, being as it were the equitable owner of the land, and by virtue of his purchase entitled to the possession, he ought upon the evidence to be looked upon as being actually in possession, there being no one in possession holding him out, and he having by his agent actually entered upon the land on the occasions and for the purposes mentioned in the evidence. We think he was sufficiently in possession to enable him to bring trespass against a wrong-doer. We refer to the case of *Butcher v. Butcher* (7 B. & C. 399), and to a case in our court of *St. Leger v. Manahan* (5 O. S. 89.) If the plaintiff had contracted to buy this lot from any individual by agreement which shewed that it was intended he should take possession, paying interest on the purchase money, and engaging to pay the principal by instalments, there can be no question that he could bring trespass after entry against any person who wrongfully entered upon his land, and cut down trees. And it is also clear, we think, that what was proved in this case to have been done by the plaintiff, through his agent, could have been held a sufficient entry and assertion of title. Then, in such case, if a question arose, whether the vendee could be allowed to recover for the value of the timber cut, or only for the trespass in entering upon the land, with nominal damages for cutting the trees, upon the principle that the trees still belonged to the owner of the legal estate, though he had no right to cut them, or take them away, but must leave them to go with the land which he had sold, when the vendee should be entitled to claim conveyance, justice, we think, would be in favour of the compensation for the value of the trees going to the vendee, rather than to the vendor; but there are arguments which will readily suggest themselves to the contrary.

The case of *Lewis v. Branthwaite* (2 B. & Ad. 437), seems to favour the action by the vendee for substantial damages in such cases, though at present we doubt whether they do not rather fall within the principle as between the lessor and his tenant at will, which is said to be this: "If a stranger

cuts trees, the tenant at will shall have action, as shall also the lessor, regard being had to their several losses."—(Co. Lit. 57 *a*, note 378).

This at any rate is clear, that the person owning the equitable freehold as a contracting purchaser may after entry bring trespass against the wrongdoer for entry on the land, and may have nominal damages for the deterioration of the estate by cutting down the trees, though he is not the owner of the timber.

But there is still this question peculiar to the present case—namely, whether, admitting the law to be so as regards a contracting purchaser from an individual, and admitting also that on the principle of the common law a contracting purchaser from the crown would stand in no less favourable situation as regards a wrong-doer, there may not yet be a difficulty in allowing the plaintiff in this case to recover, by reason of the statutes which have been passed in this province respecting the vendees of crown lands, who have not yet obtained their patents.

It appeared to me on the trial that the last Land Sale Act, 16 Vic., ch. 159, in repealing the 4 & 5 Vic., ch. 100, merely deprived purchasers from the crown of those privileges in regard to bringing actions which that statute had given them, and left them to stand on their rights at common law. The mere repeal of that statute, we think, did not place him in a worse situation than he would have been in if no such act had been passed.

But it is contended that the new enactments on the subject contained in the later statute 16 Vic., ch. 159, do materially interfere with the position in which purchasers of crown lands before they have obtained their grants would otherwise have stood at common law.

The 1st, 6th, 11th, 27th & 29th clauses are all, we think, that bear at all upon the point; and it is the 6th chiefly that it can be material to consider. In our opinion the effect of that clause, which is altogether an enabling clause, is merely to settle the rights of persons who obtain licenses of occupation; and whether it does or does not carry these beyond what they would be recognised as possessing at common

law, we do not think that either the repeal of the former act, or the enactment contained in this 6th clause, affects the position at common law of those purchasers of crown lands who have entered and taken possession of the lands with the knowledge and assent of the crown. All that can be justly said, we think, is that the statute law now gives no additional privileges or rights to such purchasers, unless they have obtained a license of occupation under the seal of the commissioner of crown lands.

The legislature could not have intended that any person who had purchased from the crown, and taken possession as purchaser of land for which he was paying instalments, should have no remedy against a wrong-doer for a disturbance of his possession, unless he held a license of occupation such as is mentioned in the sixth clause.

That is our present view of this act; and if it would be right to hold in accordance with it, as we think it would, that a stranger could not enter on the actual visible occupation of a purchaser so situated, and pull down his fences, and cut down the wood growing upon his land, then the only cause for doubt in any case of the kind would be whether a mere entry and taking possession, without residence or cultivation and improvement, would place a vendee in the same situation in regard to his remedy against wrong-doers as he would be in while residing upon and actually occupying the land by himself, his tenants or servants.

Referring again to the case of *Harper v. Charlesworth*, and other authorities on that point, we think that as against wrong-doers one who has entered into a contract of purchase from the crown, which gives him a right to take possession, is to be looked upon as in possession after he has entered by himself or agent in consequence and by virtue of his purchase, and is in a situation, though not being upon the land, to pursue a remedy against wrong-doers.

Then, if so, the plaintiff in the case before us could sue in trespass this defendant, who entered upon his land wrongfully, and cut trees; and whether he was entitled to recover for the value of the timber, or only for the wrongful entry, and any injury to the possession, would in this case signify

little, on account of the small number of trees proved to have been cut.

If the jury had given damages, however small, we should not have been called upon, we think, to interfere; but to throw the costs of the action upon the equitable owner of the land trespassed upon, by giving a verdict in favour of the defendant, was wrong, and it was done upon a principle and for a reason clearly erroneous, for the jury explained that they acquitted the defendant because he had paid the agent for crown timber for the trees which he had cut upon the land in question.

The defendant had sought out the plaintiff's agent before that, and promised to pay him for the admitted trespass, and his going afterwards and getting the public agent for crown timber to receive a sum of money from him, as for timber cut on the waste lands of the crown, was a mere cunning artifice, which ought not to be allowed to excuse him for the trespass, for the statute 12 Vic., ch. 30, was surely not intended to be made such use of; and it was sworn upon the trial that the agent for crown timber would never have taken the money from him, if he had been aware that the defendant had, without authority from any one, cut the timber upon land which the crown had sold, and were receiving payments for from the purchaser.

It is obvious the government could never mean to sell to a stranger the timber growing upon land which they had already sold to another person, who was entitled to occupy it, and when he had paid for it would have a right to claim a patent for the land, not deteriorated in value by any act of the crown.

It was but a few trees which were proved to have been cut down by the defendant—no more than nine—but they were valuable white oak trees, cut down to be made into staves, and at the value put upon them by the plaintiff's witnesses would be worth about £10 or £11. For that sum the court would not in general grant a new trial, though the jury may in their opinion have gone contrary to the evidence; but in this case the jury took the case into their own hands, and expressly gave the verdict upon the ground

that the plaintiff had no right to recover for the timber after the defendant had paid for it to the crown agent. That was determining the legal question, on which the opinion of the court should have been left to be pronounced after the jury had found, as they were desired to do, what the facts were. And, besides, the plaintiff's right to recover in the action could not depend upon the question whether the crown or the plaintiff had the property in the timber, for admitting for a moment that the timber when severed and converted into a chattel became the property of the crown, as being still owner of the legal estate, yet the plaintiff, if he should be regarded as being in possession (which we think he should be), having entered by his agent and being the equitable owner, had clearly a right of action against the defendant for wrongfully entering upon the land and cutting down the trees.

There was a plea on the record charging that the lands belonged to the plaintiff, and the effect of that being found for the defendant is to establish, as between these parties, that the plaintiff is not so far the owner of the land as to entitle him to sue the defendant for entering and committing trespass upon it. If that plea has been improperly found in favour of the defendant, it is of consequence that the error should be corrected, for otherwise the defendant might be encouraged to commit further trespasses upon the same land.

While we were giving judgment in this case last term, it was stated at the bar that in a case of the same plaintiff against another defendant (Allan McLean,) the Court of Common Pleas had in a judgment just delivered taken a different view of the effect of the statute 16 Vic., chap. 159, repealing the former land sale act 4 & 5 Vic. chap. 100; and as it is important to preserve a uniformity of decision upon questions of this kind, and a short delay in disposing of this case could be of no consequence, we withheld judgment until we could have an opportunity of seeing the judgment of the Court of Common Pleas. We have since seen and considered it, (a) but regret that we cannot concur in some of

(a) Henderson v. McLean, 8 C. P. 42.

the opinions expressed in it, for we still think that the mere repeal by the act 16 Vic., chap. 159, of the statute 4 & 5 Vic., ch. 100, had not the effect of disabling purchasers of crown land who had taken possession, but not obtained a patent, from protecting themselves against trespassers, but left them as they would have stood at common law if no such act as 4 & 5 Vic., chap. 100 had been passed, and that the 6th clause of the statute 16 Vic., ch. 159, does not deprive the purchaser of crown lands of any right which he would have had at common law before obtaining his patent, according to the facts of his case, but defines what shall be the position of such purchasers when they obtain from the government an instrument in the form of a "license of occupation," making their position less uncertain and more favourable than it would be at common law.

And in considering what remedy such purchasers from the crown would have at common law against strangers who entered upon their lands and committed trespass, we continue to think the only ground of doubt in such case must be whether such purchaser can under the facts proved be looked upon as being sufficiently in possession to maintain trespass against a wrongdoer. No difficulty, we think, is presented by the fact of the legal estate being still in the crown, for if before the case of *Harper v. Charlesworth* (4 B. & C. 574) a person in the position of the present plaintiff would have been regarded as precluded from bringing trespass against a wrongdoer, on the ground that he was himself an intruder upon the possession of the crown, we think the effect of that decision is to shew that the ancient doctrine respecting intruders upon the possession of the crown, cannot in reason be applied to such a case, for that a contracting purchaser holding possession with the concurrence of the crown, cannot in any just sense be regarded as an intruder.

Whether the acts done by the plaintiff in this case through his agent placed him sufficiently in possession to enable him to bring trespass, is the point that appeared to us to require most consideration in this case, and upon that the case of *Butcher v. Butcher*, (7 B. & C. 399) is a strong authority.

We grant a new trial in this case, because the jury did not find for the defendant on any doubt as to his being in pos-

session, but because, as they said, the defendant had paid the crown agent for the timber, which, for the reasons before stated, was no justification or excuse, or recompense for the trespass, and was, beside, not a defence under any plea on the record.

If the plaintiff had held a "license of occupation" such as is spoken of in the 6th clause of 16 Vic., chap. 159, he need have offered no proof of his being actually in possession, for that is made by the statute to constitute of itself *prima facie* evidence of his possession. But we do not take it to be the effect of that clause, that without such license of occupation proof of actual possession will not avail, neither, indeed, do we think, can the judgment of the Court of Common Pleas be taken to go that length. We grant a new trial, without costs.

Rule absolute.



A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM MICHAELMAS TERM, 21 VICTORIA, TO
TRINITY TERM, 22 VICTORIA.

ACCOUNT.

Action for not accounting.] — See
PRINCIPAL AND AGENT.

ACTION.

See ARREST.—ATTORNEY.—CHATTEL MORTGAGE, 3.—COVENANT.—CROWN LANDS.—FALSE REPRESENTATION.—INSURANCE, 5.—JOINT STOCK COMPANIES, 1, 2.—MUNICIPAL CORPORATIONS, 3.—PRINCIPAL AND AGENT.—RAILWAYS AND R. W. COS., 1, 3, 4, 5, 7, 9, 10, 11.

Commission under 12 Vic., ch. 81, sec. 181—Power to summon witnesses and call for documents—Refusal to appear or produce documents, and procuring clerk to conceal them—Action therefor—Conspiracy—Declaration—Demurrer.] —The plaintiffs, the Municipality of East Nissouri for 1858, by their declaration — after alleging that the defendants were Township Councillors for East Nissouri du-

ring 1856: that a commission was issued under 12 Vic., ch. 81, sec. 181, to enquire into the financial affairs of the township, and the commissioners had thereby, and by force of the statute, all such powers as by law are vested in commissioners under 9 Vic., ch. 38, and were, by virtue of the said commission, and of said statute, empowered to summon witnesses before them, and require them to give evidence, and produce such documents as the commissioners should deem requisite; and that the commissioners, in pursuance of their said powers, met, and summoned the defendants as witnesses to give evidence on oath, and produce certain documents which the said commissioners deemed requisite — charged that defendants, contriving and maliciously intending to obstruct and delay the commissioners in the discharge of their duties, and in making the said inquiry, and to cause great damage to the plaintiffs by

reason of the expenses of said commissioners, and to obstruct and delay them in obtaining said evidence, and to prevent the production of said documents, wickedly and maliciously among themselves did conspire, contrive, confederate and agree together to obstruct and delay the commissioners in making said enquiry, and to cause great expense to the plaintiffs by increasing the costs of said commission, and to obstruct and prevent them from obtaining said evidence, and to obstruct and delay the production of said documents, and prevent and hinder the said enquiry. And that defendants, maliciously contriving and intending as aforesaid, afterwards, and in pursuance of the said conspiracy, &c., refused and neglected to attend before the said commissioners as witnesses, and to give evidence to them, and to produce the said documents, although defendants might, and could, and ought to have attended and given such evidence, and produced said documents: and did procure one N., the clerk of said Municipality, and who as such clerk had the custody and possession of said documents, to part with the custody and possession thereof, and to conceal or remove himself, to avoid being summoned or attending as a witness before said commissioners, and to obstruct and delay the production of said documents before them; and did otherwise procure the said documents to be concealed and kept concealed from said commissioners—whereby the said enquiry was hindered and delayed, and the plaintiffs were in consequence made liable to pay £300 over and above what they

would otherwise have been compelled to pay, if it had not been for said acts and conduct of defendants. That the necessary expenses of executing said commission, as provided by the statute, would not have exceeded £50, except for such unlawful conduct of defendants; but in consequence and by means thereof, and of the premises, said expenses amounted to £350, and the same were, after the execution of said commission, and before this suit, settled and allowed by the Inspector General, according to the statute, at £350, being £300 more than would otherwise have been incurred or allowed, and which said sum the plaintiffs had paid to said commissioners before the commencement of this suit.

Upon demurrer, held that the declaration was good. That although a case of the first impression, a good ground of action was shewn, there being a wrongful act done by the defendants without any reasonable cause, and legal damage resulting to the plaintiffs. As to the various objections taken: 1. *Held*, that the damage was sufficiently stated, and was a legal damage, being directly occasioned by the act complained of. 2. *Quære*, whether the declaration could be taken to allege that power was given by the commission to summon witnesses, &c. If not, the commissioners would have no such power. 3. *Held*, that it was sufficiently averred that defendants acted maliciously, and without reasonable or probable cause. 4. That the fact of the costs having been allowed by the Inspector-General at £350, was no answer to the charge made against defendants. 5. That it was unnecessary to aver that defendants had been tendered their expenses as witnesses, there

being no provision for such payment. 6. Or that the evidence or documents required were material. 7. That as upon the whole declaration good ground was shewn to sustain an action on the case, it could be no objection that a conspiracy was alleged, and that the facts stated would not support an action for conspiracy. 8. That defendants must be treated as being charged as individuals, not as acting in their capacity of councillors. *Municipality of East Nis-souri v. Horseman et al.*, 556.

AFFIDAVIT.

See CHATTEL MORTGAGE, I, 3.—
COMMISSION FOR TAKING AFFI-
DAVITS.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See ASSIGNMENT, I.—CONTRACT.
—FRAUDS (STATUTE OF)—VEN-
DOR AND VENDEE, 6, 9.

*Inserted in bond after the condi-
tion*]—See ARBITRATION AND
AWARD, 3.

AMBIGUITY.

See DESCRIPTION.

AMENDMENT.

See BOND.—INSURANCE, 4.

APPEAL.

See COUNTY COURT.—INDEMNITY.
MUNICIPAL CORPORATIONS, I, 3.

APPRENTICE.

See COVENANT.

ARBITRATION AND AWARD.

See RAILWAYS AND R. W. COS. 2.

I. *Remitting matters back.*—*C. L. P. A.*, sec. 88.]—Where an award is valid and unexceptionable on the face of it, the court will not reter matters back in order that the abitrators may state upon what grounds their decision was arrived at, and thus enable a motion to be made against it if illegal. *Wells v. Gzowski et al.*, 42.

2. *Award made by two arbitrators in the absence of the third.*—*Necessity for notice to the third.*]—The reference was to two arbitrators, with power to appoint a third, the award to be made by the three or any two of them. The subject referred was what sum of money *should be paid by P. to M.* as the difference in value in certain land to be given up by each to the other, and the costs were to be in the discretion of the arbitrators. The arbitrators met, and two of them, considering that the land to be given up by P. was worth £50 more than that of M., determined to award that the difference *should be paid by M. to P.*, and that the costs should be borne equally by both parties. When the two went to have the award drawn up they were told that it was out of their power under the submission to award any sum to be paid by M. to P.; and they then, at a subsequent meeting, altered their decision; and awarded one shilling to M., but directed that he should pay all costs, which they fixed at £76 10s. The third arbitrator was not present at the last meeting, and it appeared that he

had been notified of the intention to meet again, but no proper notice had been given to him of the time and place of meeting, nor of the intended alteration in the award. *Held*, that the award must be set aside: that by sending notice to the third arbitrator of their intention to meet again, the two making the award had shewn that they did not consider his declaration of dissent as final, and therefore he should have had proper notice to enable him to confer with them on the propriety of the proposed change in the award. *In re McDonald and Presant*, 84.

3. *Evidence of submission and of execution—Interest—Construction of submission bond—Costs.*]—In an action on an award it is sufficient to produce the submission bond executed by defendant, without that by the plaintiff. It is not necessary for the plaintiff to shew that the award was executed by the arbitrators at the same time. That is assumed in the first instance, but defendant may shew the contrary under a plea denying the award. Interest is usually allowed, without demand made, on sums awarded to be paid at a particular time. An agreement that all costs shall be in the power of the arbitrators, &c., inserted after the condition of the bond, must be read as part of it. Extravagance in the amount of costs allowed by the arbitrators under such a submission must be objected to by motion. *Towsley v. Wythes*, 139.

4. *Submission by executor—Power to bind him personally.*]—On a submission between A. and defendant, describing himself as executor of B., of all matters in difference between the said parties in reference to the business carried on by

the said A. and B. in partnership, with liberty to the arbitrators to order and determine what they should think fit to be done by either of the parties respecting the matter referred. *Held*, that the arbitrators had power to order a sum to be paid by a defendant absolutely, not merely to bind him as executor. *Mulligan v. Wright*, 408.

5. *Revocation—7 W. IV. ch 3, sec. 29—C. L. P. A. sec. 97.*]—Declaration on a bond of submission to arbitration, setting out an award made, and alleging non-performance. *Plea*, that defendant, before the award revoked the submission (*not saying by an instrument under seal.*) *Replication*, that the bond was executed after the passing of the Common Law Procedure Act, 1856: that it contained nothing to shew that the parties intended that it should not be made a rule of court: that the revocation in the declaration and plea mentioned is the same; wherefore, and by force of the statute, the arbitrators were empowered to proceed with the reference, notwithstanding such revocation, and did proceed, although defendant did not attend. *Rejoinder*, that although the bond was executed after the Common Law Procedure Act, and contains no provision that it should not be made a rule of court, yet neither the bond nor condition was at the commencement of this suit, nor at the time of the revocation mentioned in the plea, a rule of court, or in any way exempted from the effect of the said revocation. *Held*, on demurrer to the rejoinder, that both the plea and rejoinder were bad. *Semble*, that the restraint upon revocation without leave of the court or a judge, provided by 7 W. IV., ch. 3, sec. 29, is now extended by the Com-

mon Law Procedure Act, sec. 97, to all submissions which do not contain words purporting that they are not to be made a rule of court. *Wood v. Closter*, 490.

ARREST.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.—MALICIOUS PROSECUTION.**

1. *Set aside on condition that no action shall be brought—Meaning of condition.*—Where an arrest is set aside on condition that no action shall be brought, that means no action which could not have been brought unless the writ had been set aside. Defendant therefore is not restrained from an action against the plaintiff for maliciously arresting him without reasonable or probable cause for believing that he was about to leave the country. *Graham v. Thompson*, 259.

2. *Bail—Recognizance—Render—Delay.*—The bail, before action brought on the recognizance, took the debtor to an office some distance from the court house, where the deputy-sheriff was in the habit of transacting business with practitioners, and there tendered him in their discharge. The deputy referred them to the sheriff's office as the proper place, where they went, but found only a clerk, who had no authority to act in such matters. They then went to the gaol, and tendered him to the gaoler's wife, the gaoler being absent, but she refused to receive him. Afterwards the plaintiffs sued on the recognizance. Defendants applied without success in Chambers to stay proceedings, and at the end of three months rendered the principal. A verdict having been found for the plaintiffs—*Held*, that the

court could not interfere. *Read et al. v. Scovill and Wilson*, 453.

ARREST OF JUDGMENT.

See **SLANDER.**

ARSON.

See **CRIMINAL LAW, 4.**

ASSESSMENT.

See **TAXES.**

ASSIGNMENT.

See **CHATTEL MORTGAGE.—DISTRESS.—DOWER, 2.—INSURANCE, 1, 6.**

1. *Assignment in trust for creditors—Liability of assignees for money received.*—The declaration charged that the plaintiff, having recovered judgment against A. & Co., had seized and was about to sell their goods under a *fi. fa.*, and in consideration that the plaintiff would withdraw his writ defendants promised to pay the amount. A count was added for money had and received. It appeared that A. & Co., being indebted for rent, and three executions, of which this was one, having issued against them for other claims, they made assignment to the defendants of all their goods, in trust *out of the proceeds* to pay the landlord, and these executions, according to their legal priority, then to pay to preferential creditors named, and lastly to divide the surplus money among the other creditors executing the assignment. This assignment was executed by the defendants, but not by the plaintiff. It was put in at the trial by the plaintiff, and it was proved that the defendants had

received moneys under it, but no promise was shewn by them except what was contained in the deed, in which it was recited that the defendants had agreed to pay the claims above mentioned out of the proceeds of the property assigned, if sufficient. *Held*, that the plaintiffs could not recover: that the first count was not proved, the only promise made being that contained in the deed, which was to pay out of the proceeds of the goods; and upon the second count, defendants, as trustees, could be liable only in equity, or if at law in a special action on the deed. *Myndert Harris v. Buntin and McPhail. Almond Harris v. Buntin and McPhail*, 59.

2. *Unfairness of trusts—Property assigned out of proportion to the debts proved—Affidavit of bona fides—Description of goods—12 Vic., ch. 74, 13 & 14 Vic. ch. 62.*]—A debtor, by deed, reciting that he had become embarrassed by indorsing and as security for others, assigned all his property, both real and personal, including land worth about £1500, in trust to pay, first, the parties named in a schedule annexed, being those to whom he had become indebted on his own account, whose claims did not exceed £110; and secondly, the other creditors who should execute the assignment. There was no evidence of more than a few trifling debts, amounting to about £150. *Held*, that there was nothing in the nature of the trusts created for which the deed could be held void in law; but the jury having found in favour of the assignment, the court granted a new trial, considering that there was much ground for suspecting that the few direct claims had been made a pretence for tying up all the debtor's property, and defeating other creditors. *Held*,

also, that the affidavit of *bona fides*, made (before the 20 Vic. ch. 3) by one of the assignees was sufficient; and that the assignment was not avoided by a delay of eight days in registering it. *Held*, also, that the description of the goods assigned, set out below, was sufficient. *Balkwell et al. v. Beddome*, 203.

3. *Assignment in trust for creditors—Necessity for registration—20 Vic., ch. 3—Description of the goods—Filing a copy—Goods in the customs warehouse—Change of possession.*]—*Held*, that a description of the goods assigned, as all the goods, &c., of the assignor being in and about his warehouse on Y. street, and all his furniture in and about his dwelling-house on W. street, and all bonds, bills, and securities for money, loans, stock, notes, &c., &c., whatsoever and wheresoever belonging, due, or owing to him—was sufficient to satisfy the 20 Vic., ch. 3, sec. 4. Per *Robinson, C. J.*, and *McLean, J.*—That under that statute a copy of an absolute assignment or bill of sale may be filed, as well as of a mortgage. Per *Burns, J.*—That the original must be filed. As to certain goods belonging to the assignor, but lying in the customs warehouse subject to duties, no change of possession having taken place, and no compliance being shewn with the formalities required by the customs act 10 & 11 Vic., ch. 31—*Held*, that such goods did not pass by the assignment. Per *Robinson, C. J.*—The statute requiring registration does not apply to such goods, as they are not capable of delivery, and they would therefore have passed if the directions of the customs act had been followed. Of the household furniture mentioned in the assignment, there had been no change of possession, and the

court being left to draw the same inferences as a jury would. *Held*, per *Robinson*, C. J.—That notwithstanding the registration of the assignment, such furniture did not pass. Per *Burns*, J.—That it did not pass, because the assignment was not properly registered by filing a copy only. As to the other goods in the warehouse of the assignor, C., who had been his clerk and book-keeper, was employed by the assignees as their agent to dispose of the stock, and collect the debts due, &c.; and he took possession accordingly, opened new books in the name of the assignees, and sold and collected the assets under their instructions, but continued in the same place, the name of the assignor remaining above the door as usual. *Held*, a sufficient change of possession within the meaning of the act. *Quære*, per *Robinson*, C. J.—Whether assignments in trust for creditors are within the statute, so as to require registration; but held that they are. *Harris and Woodside v. The Commercial Bank of Canada*, 437.

4. *Construction of—Fraud—Absconding debtor—Attachments.*—W. being indebted to B. and to the plaintiff, absconded, and B. attached his goods; but he afterwards returned, and made an arrangement, on which the attachment was withdrawn. W. then executed an assignment to the plaintiff, which recited that he was indebted to him “in a large sum of money,” and assigned “all and singular his stock-in-trade, chattels, debts,” &c., and “all his personal estate and effects whatsoever and wheresoever,” upon trust to sell and pay the plaintiff (the assignee) all indebtedness and moneys due and owing by W. to him, and to pay the surplus, if any, to W. He left the province again

next day: the plaintiff took possession of the goods, and the defendant some weeks after sued out an attachment for a debt due to him by W. An interpleader issue having been directed, the jury found that the assignment was made in good faith to secure a debt due. *Held*, that as there had been a change of possession, the statute 20 Vic., ch. 3, did not apply, otherwise the description of the goods would have been sufficient. *Held*, also, that the assignment could not be upheld, for it neither specified the amount secured, nor gave any schedule of the goods and debts. *Howell v. MacFurlane*, 469.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

See GREAT WESTERN R. W. CO.

ATTORNEY.

See MORTGAGE.

Investigation of title—Arrears of taxes—Negligence.—Plaintiff in 1854 employed defendant, an attorney, to examine the title to certain lands, and took a deed. Afterwards it was discovered that in 1851 a portion had been sold for taxes, but when the plaintiff purchased he had still a year to redeem. In 1857 the sheriff made a deed to the purchaser, and the plaintiff then brought this action against defendant for negligence. *Held*, that defendant was not liable. *Ross v. Strathy*, 430.

BAIL.

See ARREST, 2.

Recognizance—Delay—Pleading.]

Delay in issuing a *Ca. Sa.*, to fix the bail, cannot be pleaded in bar to an action against them on the recognizance. *Carroll v. Berryman et al.*, 520.

BAILIFF.

See DIVISION COURT.

BANK.

Embezzlement by Bank Clerk].—See CRIMINAL LAW, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See CHEQUE—CONTRACT, 3—PARTNERSHIP.—PLEADING.—VENDOR AND VENDEE, 4.

1. *Promissory note.*—*Promise to pay in cash or mortgage.*]—A promise to pay a certain sum on a day named “in cash or mortgage upon real estate” is not a promissory note, not being an absolute promise to pay money, and it does not become a note by the maker’s election to pay in cash. *Going v. Barwick*, 45.

2. *Action by indorsee against indorser*—*New trial granted as to indorser only*—*Effect of maker’s name being signed without authority*—*Estoppel.*]—In an action by indorsee against maker and indorser, a verdict was found in favour of the maker, on the ground that his name had been signed to the note without authority, and against the indorser; and a new trial was granted as to the indorser only. *Held*, that the jury at such trial were rightly directed that the fact of the maker’s name having been used without authority was a fact material for them to consider in connexion with other evidence offered to shew that the plaintiff took the

note with knowledge of the circumstances.—*Quære*, as to how far an indorser is estopped from denying the maker’s signature. *Hanscome v. Cotton*, 98.

3. Defendant endorsed to the plaintiffs a note, made by one P., for £125, due on the 13th of May, 1857. On the 13th of April P. executed to the plaintiffs a mortgage, payable on the 1st of November, 1857, for a sum including the amount of the note; but it was expressly agreed in the mortgage that it should “operate and take effect as a collateral security only.” *Held*, that the plaintiffs might sue upon the note when it fell due, although the mortgage was not payable. *Shaw et al. v. Crawford*, 101.

4. *Promissory note*—*When due*—*Writ issued on last day of grace*—14 & 15 Vic., ch. 94, Sec. 1.]—An indorsee of a note, payable at a bank, having taken it up there on the last day of grace, arrested defendant at five o’clock on the same day. *Held*, not too soon. *Semble*, that under the 14 & 15 Vic., ch. 94, sec. 1, he would have been also entitled to sue out his process at any time after three o’clock, had the note been payable generally. *Sinclair v. Robson*, 211.

5. *Construction of instrument*—*Promissory note or speciality.*]—For value received we jointly and severally promise to pay to W. P. Osborne or bearer, the sum of fifty pounds currency, in manner following, &c., &c. As witness our hands and seals, this 29th day of April, 1856. M.M. Patman. [L.S.] E.H. Gates. [L.S.] Signed, sealed and delivered, in presence of Richard Smith. *Held*, clearly not a promissory note, but a speciality. *Wilson v. Gates*, 278.

6. *Promissory note—Action against maker and indorsers—Set off—3 Vic. ch. 8.*]—*Held*, that in this action, against makers and indorsers of a promissory note, upon a plea of set-off by two of the indorsers, the jury, under the evidence set out below, could do no more than give them a verdict, and could not find in their favour for any sum beyond the amount of the note.—*Nowlan v. Spawn et al.*, 334.

7. *Promissory note—Consideration—Verbal understanding—Church Society.*—A promissory note, promising to pay the Church Society of the Diocese of Toronto, or bearer, £50, with interest, towards providing a fund for the support of a Bishop of the western diocese of Canada, who should be appointed in pursuance of an election by the clergy and laity. *Held*, to be founded upon a sufficient consideration, and recoverable in the hands of a *bona fide* holder. The jury having found for defendant, on evidence, improperly received, of an alleged understanding that defendant should be called upon for the interest only, a new trial was granted. It was objected that the Church Society had no power to hold or transfer notes; but *held* immaterial, the note being payable to bearer.—*Hammond v. Small*, 371.

8. *Bills of exchange—Damages—12 Vic., ch. 76.*]—Under 12 Vic., ch. 76, ten per cent. damages is recoverable on all bills drawn in Upper Canada on England, and protested for non-payment. *Royal Bank of Liverpool v. Whittemore et al.*, 429.

9. *Promissory note—Damages.*]—A note made here, payable in New York, but not there only, is not within the 12 Vic., ch. 76, sec.

3, so as to entitle the holder to four per cent. damages on protest for non-payment.—*Meyer et al. v. Hutchinson et al.*, 476.

BILL OF SALE.

See ASSIGNMENT.

BOND.

See VENDOR AND VENDEE, 3.

Agreement inserted after the condition.]—See ARBITRATION AND AWARD, 3.

Venire facias to assess damages—Suggestion of breaches—Amendment.]—Where an action on a bond *non est factum* is pleaded, and breaches assigned in the declaration, *semble* that no special entry of *ven. fac.* to assess damages is necessary, but if required the court, under the C. L. P. A., sec. 291, will allow it to be made afterwards.—*Corrigal et al., Executors of Nourse, v. Boulton*, 529.

BOUNDARY.

See WITNESS.

BUFFALO AND LAKE HURON R. W. CO.

See LIEN, 1.—RAILWAYS AND R. W. COS., 6.

BUILDING AGREEMENT.

See CONTRACT, 1, 2.

BY-LAW.

See HIGHWAY.—MUNICIPAL CORPORATIONS, 1, 2, 4.—SCHOOLS.

16 U. C. Q. B.

CARRIER.

See RAILWAYS & R. W. COS., 7—
TELEGRAPH COMPANY.

CA. SA.

See BAIL.

CERTIORARI.

See CRIMINAL LAW, 2.

CHATTEL MORTGAGE.

1. *Contingent liability*.—Form of Affidavit.—13 & 14 Vic., ch. 62—20 Vic., ch. 3.]—A mortgaged his property to B. for the payment of a debt due by C., and C., to secure A. from loss, gave him a chattel mortgage conditioned to be void on his paying the amount of the debt either to A. or B., or indemnifying A. against all loss from his suretyship. This was registered under the 13 & 14 Vic., ch. 62, on an affidavit, in the form prescribed, that C. was “justly and truly indebted to A.” in the amount of the mortgage. It was objected that such mortgage was void as against the plaintiff, a creditor of C., because the affidavit could not have been made consistently with the facts; but *Held*, first, that A. could properly make the affidavit under the circumstances; and, secondly, that if he could not, then the mortgage, not being within the statute, would not have required registration at all. *Baldwin v. Benjamin*, 52.

2. Where a debtor mortgaged all his personal property of every description, including the most trifling articles, to secure a debt very small in proportion to the value of the goods—*Held*, that although no evidence of value was

given, and the *bona fides* of the debt was not disputed, it should have been left to the jury to say whether these circumstances were not sufficient to shew that the deed was made, not for the security of the assignee, but for the purposes of the debtor, and to shield his property from other creditors. *Fleming v. McNaughten*, 194.

3. *Mutual Insurance Company*—Right of treasurer to take chattel mortgage for debt due to the company—Registry of such mortgage—Omission of deponent's addition—Action by treasurer for the goods.]—A treasurer of a mutual insurance company may take a chattel mortgage to himself for a debt due to the company; but it is more proper to make it to the company, and they have the power to take it. Such treasurer, as mortgagee, may maintain an action against a wrong-doer for taking the goods mortgaged, although he has no beneficial interest in them. The fact that the debt is not due to the mortgagee himself does not prevent the mortgage from being registered under the statute. The want of deponent's addition is no objection to an affidavit made for registry of a chattel mortgage. *Brodie v. Ruttan*, 207.

CHEQUE.

See SET OFF.—VENDOR AND VEN-
DEE, 5.

Post dating—Days of grace—Notice of non-payment—Proof of consideration and plaintiffs' property.]—A cheque in this country may be post-dated, though in England it is prohibited by the stamp acts. Where such cheque is payable on demand, no days of grace are allowed. Where, on the same

day that the cheque was dishonoured, defendant paid £150 to the holder on account of it.—*Semble*, sufficient to excuse notice of non-payment, though he declared that he was then ignorant of such dishonour. In this case, however, no notice was necessary, the banker being solvent. *Held*, under the circumstances set out in the evidence, that the pleas setting up want of consideration, and denying plaintiffs' property in the cheque, could not be held to be proved. *Wood et al. v. Stephenson*, 419.

CHURCH SOCIETY.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 7.

CLERK OF THE PEACE.

The clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury. *Hooker et al. v. Gurnett*, 180.

COMMISSION.

Under 12 Vic., ch. 81, sec. 181, to examine into the financial affairs of the corporation.—See **ACTION**.

COMMISSION FOR TAKING AFFIDAVITS.

Appointment for district—Continuation of authority in counties.—*Held*, affirming *Glick v. Davidson*, 15 U. C. R. 591, and dissenting from *Carter v. Sullivan*, 4 C. P. 298, that a commissioner appointed in 1840 for the district of Gore and Wellington, might, after the passing of 12 Vic., ch. 78, and 14 & 15 Vic., ch. 5, continue to

take affidavits in Galt, which was formerly within the Gore District. *Fleming v. McNaughten*, 194.

COMMON COUNTS.

See **MONEY HAD AND RECEIVED.—PRINCIPAL AND AGENT.**

COMMON SCHOOLS.

See **SCHOOLS.**

That no action shall be brought, on setting aside arrest—Meaning of.—See **ARREST.**

CONDITION.

See **CONTRACT 4.—LEASE.**

CONSIDERATION.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 7.—**CHEQUE.**—**CONTRACT**, 3.—**FRAUDS** (Statute of), 1, 2.

CONSPIRACY.

Averment of in action on the case.—See **ACTION.**

In indictment.—See **CRIMINAL LAW**, 3.

CONTRACT.

See **AGREEMENT—RAILWAYS AND RAILWAY COMPANIES.—TELEGRAPH COMPANY.—VENDOR AND VENDEE**, 6, 9.

1. *Covenant to perform carpenter's work on house—Default in completion by time specified—Action for penalty—Delay caused by the masons employed by plaintiff—Pleading.*—*Declaration.* First count—That defendants agreed to perform all the carpenter's, joiner's, and tinsmith's

work, required to complete a certain house then about to be erected by the defendants for the plaintiff, for £294, and to finish said works by the 23rd of December, and to pay the plaintiff £10 per week as liquidated damages for each week after that day until the completion of such work; and that, although defendants completed the work, and received £290 on account, and recovered judgment against the plaintiff for the residue, which judgment is still in force, yet ten weeks after the said 23rd of December elapsed before the said work was finished. *Plea*, that defendants would have completed the work within the time specified therefor, but were delayed by the masons employed by the plaintiff to build the brick-work of said house, and were thereby, without any default on their part, hindered and prevented from completing said work within such time. *Held*, on demurrer, plea good, for although it was not stated in the declaration that the plaintiff was to do the brick-work, yet nothing appeared necessarily inconsistent therewith, and it was distinctly averred in the plea, so that an issue taken thereon must have led to a determination of the case on its merits. *Held*, also, that the defence set up was clearly good. *Papps v. Melville et al.*, 124.

2. *Building contract—Agreement to take timber in part payment—Property in such timber when delivered.*—Defendant agreed to put up a building for the plaintiff, for £450, and to take in payment thereof from him £250 in materials, at the cost prices, or such quantity as the said building should require, and the balance, if any, in cash. The timber had been all furnished, and the building partly completed,

when it was blown down, and the design of going on with it was abandoned. *Held*, that the timber so delivered belonged to defendant. *Graham v. Wiley*, 265.

3. *Pleading—Promise by one of several debtors—Statement of consideration—Promissory note.*—The declaration set out as inducement certain facts, by which the defendant, with C. and Y., became liable to pay the plaintiff £60; and alleged that in consideration thereof the defendant, by an instrument in writing, promised the plaintiff to pay her the same. *Held*, on demurrer, declaration good, for, *first*, it was in effect a statement that defendant made his promissory note, and if so, no averment of consideration was required; and, *secondly*, if not a promissory note, the consideration stated was sufficient. *Parsons v. Jones*, 274.

4. *Agreement to saw logs at certain rates payable monthly—Condition precedent—Measure of damages—New trial.*—Defendant agreed to saw for the plaintiff a certain quantity of logs, which the plaintiff was to deliver at his mill, at specified rates, which would have amounted in all to £590, and it was stipulated that the money should be paid "in cash, or by a negotiable note, at three months, at the end of each month's work." To an action for not sawing logs so delivered, defendant pleaded that he had sawn some of the logs, but the plaintiff refused to pay him according to the agreement, and that he had recovered judgment for such default, which judgment was still unsatisfied. *Semble*, that the plea formed a good defence. *Quære*, as the measure of damages to be recovered. But as the jury found for the plaintiff, when the plea was

in fact proved, a new trial was granted. *Buchanan v Anderson* 331.

CORONER.

See INQUISITION.—PLEADING.

CORPORATIONS.

See JOINT STOCK COMPANIES.—
MUNICIPAL CORPORATIONS.

COSTS.

See ACTION.—ARBITRATION AND
AWARD, 3.—DOWER.—SLANDER.
Of Striking a special jury.]—See
CLERK OF THE PEACE.

The plaintiff leased a house from defendant, and a dispute arose as to the liability for some repairs, which, as the jury found, had been done by the plaintiff's order, but on the understanding with defendant's agent that defendant should pay. Defendant refused to pay; and the plaintiff, being sued for the workdone, defended the action, on the ground that the defendant only was liable to the contractor; but a verdict was rendered against him, which he paid, with costs. The plaintiff thereupon sued defendant. *Held*, that he could recover from defendant the amount of such verdict only, not the costs. *Taylor v. Strachan*, 76.

COUNTY COURT.

See INDEMNITY.—MUNICIPAL COR-
PORATIONS, 1.

Title to land in question—Practice.]—In an action of trespass in a county court defendant pleaded pleas bringing the title to land in question, accompa-

nying them with the affidavit required by 8 Vic. ch. 13, sec. 13. A nonsuit having been ordered—*Held*, upon appeal, that the effect of the pleas was to oust the jurisdiction of the court altogether: that the judge should therefore have refused to entertain the case; and that the judgment of nonsuit must be reversed. *Powley v. Whitehead*, 589.

COVENANT.

See INSURANCE, 1.

Covenant to teach and board—Liability of heir thereon.]—The plaintiff declared against defendant, as heir of W., upon an indenture, by which he alleged that W. in her life-time covenanted with the plaintiff to teach and find board and lodging for her during a specified period, and that in the event of her death her heirs, executors, and administrators, should perform the covenant. *Held*, bad, for 1. By the form of the covenant the heir was not bound; and 2. Upon such a contract, being one of apprenticeship, he could not be made liable. *Fraser v. Wright*, 514.

COVENANTS FOR TITLE.

See VENDOR AND VENDEE, 1, 2.

CRIMINAL LAW.

See INQUISITION.

RULES MADE UNDER THE CRIMINAL
APPEAL ACT, 159.

Embezzlement by bank clerk—Form of indictment—Contra formam statuti—19 Vic., ch. 121, sec. 40]—The prisoner, being a clerk in the Bank of Upper Canada, was

placed in an office apart from the bank, and entrusted with funds for the purpose of paying persons having claims upon the government, which payments were made upon the checks of the Receiver-General, whose office was in the same building. While so employed a deficiency was discovered in his accounts, which he first ascribed to a robbery, but he afterwards confessed that he had lent the moneys entrusted to him to various friends. It also appeared that on a certain day he had received a check from the Receiver-General for £1439 15s., for coupons on government debentures held by the bank, and had credited himself in account with that sum as if paid out by him on the check, making no entry of the coupons, thus covering his deficiencies by so much, and making it appear that he had paid out the amount of the check in cash, when in fact he had paid nothing. The indictment contained two counts; *the first* charging that on, &c., the prisoner, being a clerk, then employed in that capacity by the bank, did then and there in virtue thereof receive a certain sum, to wit, £1439 15s. for and on account of the said bank, and the said money feloniously did embezzle. *The second*, that he, as such clerk, received a certain valuable security, to wit, an order for the payment of money, to wit, £1439 15s. for and on account of the said bank, and the said valuable security feloniously did embezzle. On this indictment he was convicted of embezzlement. *Held*, first, that the indictment was sufficient in form, the omission of the conclusion *contra formam statuti* being no objection. Secondly, that the prisoner had been guilty of embezzlement within the 19 Vic., ch. 121, sec. 40; and

the conviction was affirmed. *Regina v. Cummings*, 15.

2. *Conviction for working on Sunday*—8 Vic., ch. 45—*Statement of defendant's calling—Negating exceptions—Appeal to Sessions—Certiorari*.]—Defendant was convicted under 8 Vic., ch. 45, "for that he, Jacob Hespeler, of the village of Preston, Esquire, did on Sunday, the 26th day of July last past, at the township of Waterloo, work at his ordinary calling, inasmuch as he and his men did make and haul in hay on the said day." He appealed to the Quarter Sessions, where the question was tried before a jury, and the conviction affirmed. The proceedings having been removed by *certiorari* to this court. *Held*, 1. That the statute 13 & 14 Vic., ch. 45, extended to this case, and authorized the trial by jury, though in the 8 Vic., ch. 45, there is a provision for appeal to the Sessions, but not for such trial. 2. That a *certiorari* would lie, not to examine the finding of the jury on the facts, but to determine whether the justices had exceeded their jurisdiction. 3. That the conviction must be quashed, as not shewing any offence within the statute, for defendant was not alleged to be of nor to have worked at any particular calling. *Semble*, that it was also bad, for not negating the exception in the statute, by stating that the work done was not one of necessity. *Hespeler, Appellant, and Shaw, Respondent*, 104.

3. *Indictment—Conspiracy—Error*.]—Indictment charging that defendants H. C. and D. were township councillors of East Nissouri, and F. treasurer: that defendants intending to defraud the Council of £300 of the moneys of said council, falsely, fraudulently,

and unlawfully, did combine and conspire, unlawfully and fraudulently, to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of said T. as treasurer as aforesaid. *Held*, bad, on writ of error. *Horseman, et al. v. The Queen*, 543.

Arson—Indictment against two—Slight evidence against one—His right to be called for the other—Or to have his case submitted separately.—Where no evidence appears against one of the several prisoners he ought to be acquitted at the close of the prosecutor's case.—*Quære*, whether without such formal acquittal he may be called as a witness for his co-prisoner. *Semble*, not, unless it appears that he has been joined in order to exclude his testimony. It is in the discretion of the judge at the close of the prosecution, to submit such prisoner's case separately to the jury; but he is not bound to do so, and whether he has rightly exercised his discretion or not, cannot be reserved as a point of law. *Held*, that in this case it could not be said that there was no evidence against E. H., one of the prisoners; and *semble*, that under the circumstances, he could not be called as a witness for the other. Where points of law were reserved under the act, and the prisoner, besides relying upon them, moved for a new trial, the court refused to grant it, though the evidence was slight. *The Queen v. William Hambly and Edmund Hambly*, 617.

CROWN GRANT.

* See FERRY—LIMITATIONS (STATUTE OF) 2, 3.—SEAL.

CROWN LANDS.

Purchaser from Crown—Right of action against wrong-doer—Proof of possession—Effect of 16 Vic., ch. 150.]—The plaintiff entered into an agreement for purchase of land from the crown. He had the lots surveyed, and paid persons to look after them for him, who had frequently entered and examined them, but the plaintiff had not entered upon the land himself, nor cultivated any portion of it. Defendant went upon the land and cut trees, for which he offered to settle with the plaintiff's agent, but he afterwards went to the local crown land agent, who was ignorant of the plaintiff's purchase, and got him to accept a sum of money and give a receipt for it, as for timber cut on the same land.—*Held*, that the plaintiff's possession was sufficient to maintain trespass against defendant, and that the payment to the crown land agent formed no excuse. *Quære*, whether as vendee he could recover substantial damages for the trees cut. *Held* also, that the 16 Vic., ch. 159, by repealing the former acts, does not confine the right of action against wrong-doers to those who have obtained the license of occupation mentioned in the 6th clause; but leaves to other purchasers whatever rights they may have at common law.—*Henderson v. McLean*, 8 C.P. 42, in part dissented from. *Henderson v. McLean*, 630.

CUSTOMS.

Assignment of Goods in Customs Warehouse.]—See ASSIGNMENT, 3.

DAMAGES.

See DOWER.—LIQUIDATED DAMAGES.—NEW TRIAL, 2.

Statement of in Pleading—See ACTION.

On Protested Bills and Notes—
See BILLS OF EXCHANGE AND
PROMISSORY NOTES, 8, 9.

DEBENTURES.

See MUNICIPAL CORPORATIONS, 1.

DEBTOR AND CREDITOR.

See ASSIGNMENT.

DEED.

Construction—Habendum inconsistent with premises.—Under a conveyance to A., her heirs and assigns, *habendum* to A., her heirs and assigns, and in the case of her decease leaving issue, then in trust to O. (her husband,) his heirs or assigns, to and for the benefit of the said children, their heirs and assigns, to be sold for their benefit, if the said O., his heirs or assigns, should think fit; and if the said A. should not survive the said O., leaving no issue, then to the said O., his heirs and assigns for ever. *Held*, that the *habendum* being inconsistent with the premises the former must govern, and that A. took a fee. *Owston v. Williams et al*, 405.

DELAY.

In rendering bail—See ARREST, 2.

In registering assignment.—See ASSIGNMENT, 2.

Action on building agreement—Delay caused by the masons employed by plaintiff.—See CONTRACT, 1.

In applying to stay proceedings.—
See DIVISION COURT.

Beyond defendant's line, in transmitting goods by railway or message by telegraph.—Liability for.—See RAILWAYS AND RAILWAY COMPANIES, 7.—TELEGRAPH Co.

In calling on defendant after dishonour of cheque given by him in payment of goods.—See VENDOR AND VENDEE, 5.

DELIVERY.

On sale of Goods—Effect of.—
See VENDOR AND VENDEE, 4.

DEMURRER.

Where there is a demurrer to a plea, and exceptions are taken to the declaration; if the plaintiff on the argument abandons the demurrer, the court will not give judgment on the exceptions. *Martin v. Arthur*, 483.

DESCRIPTION.

On goods assigned.—See ASSIGNMENTS, 2, 3, 4.

Lease—Defective description—Latent ambiguity—Parole evidence.—Defendant leased to plaintiff a lot of land, "known as the Denison Terrace residence, and to embrace all the land from the carriage drive in front of the house to Dundas street, on the south, to be bounded on the east by the garden fence of my old cottage, and on the west by McGregor's garden and my orchard, and to embrace all the flats even with the north part of the cottage now occupied by my carpenter, and which cottage is to go into the bargain with the land." It appeared that the garden fence extended only part of the way to the drive from Dundas street, and the dispute was

as to the eastern boundary beyond it. *Held*, that the plaintiff was not therefore entitled to claim to the eastern boundary of all the land known as the park, but that this being a latent ambiguity, parol evidence was admissible to ascertain what was intended by the parties. *Burgess v. Denison*, 457

2. An agreement to sell and convey, or a deed of, "one acre of land, being part of the north-east quarter of lot 19, in the seventh concession of Darlington," is not void for uncertainty, but the purchaser may elect what acre he will have. *Cummings v. McLachlan*, 626.

DETINUE.

See REPLEVIN, I.

DISTRESS.

See TAXES, 2.

Exemption—Goods in the way of trade—Sale of Goods—Change of Possession.]—M. a ship builder, carried on his business in a yard leased from A. The plaintiff sent two vessels there to be repaired, but M. not having sufficient means it was agreed that the plaintiff should furnish the materials, and he purchased from M. for the purpose some oak timber then in the yard. The plaintiff's foreman took possession of it, and a portion had been worked up by the plaintiff's and M.'s men, when A. distrained both it and the vessels for rent. *Held*, that there had been a sufficient change of possession of the timber to dispense with a registered assignment; and that both it and the vessels were exempt from distress. *Gildersleeve v. Ault and Friel*, 401.

DIVISION COURT.

See RAILWAYS AND R. W. CO.'S, 6.

Interpleader—Action against bailiff for seizure—Application to stay proceedings—Laches—13 & 14 Vic., ch. 53, sec. 102; 16 Vic., ch. 177, sec. 7—Construction of.] The plaintiff in November, 1856, sued defendant, a bailiff of a division court, in trespass for seizing his goods; defendant thereupon, in February, 1857, obtained a summons in this court, calling on the plaintiff to shew cause why the action should not be stayed, and why the Judge issuing the summons should not adjudicate upon the plaintiff's claim. When this summons was obtained, an interpleader order was pending in the Division Court, which the judge of that court determined in March, by deciding that the plaintiff was entitled to the proceeds of the goods sold, and £15 as damages, for taking them, which the execution plaintiff then paid into the Division Court. In the mean time, however, the summons in this court had been discharged; and afterwards the plaintiff proceeded with the action by filing a declaration in August, to which the defendant pleaded; and a trial took place, which resulted in a verdict for the plaintiff. The defendant then applied to rescind the order discharging the summons in this court, and to stay proceedings. *Held*, that the summons should not have been discharged altogether, but proceedings should have been stayed, as directed by the 16 Vic., ch. 177, sec. 7; and that the defendant was still entitled to a stay of proceedings, under the statute, notwithstanding his laches; but on account of his delay the rule was made absolute, without costs. Under the 13 and 14 Vic., ch. 53, sec.

102, and 16 Vic., ch. 177, sec. 7, amending it, the judge of the Division Court must adjudicate upon the claim to goods seized; but the application to stay proceedings in any action brought for the seizure must be made to the court, or a judge of the court, in which such action is pending. *Washington v. Webb*, 232

— DOWER.

1. *Damages—Demand—13 & 14 Vic., ch. 58.*]—Dower—Plea, *tout temps prist.* There was no averment that the husband died seized, and no damages were claimed, but the jury found for the plaintiff, and 1s. damages. *Held*, that the damages must be struck out. Where nothing appears on the record to shew that a demand of dower was served, *semble* that the master cannot tax costs; and, *quære* as to the proper mode of shewing that a service of demand was “made appear on the trial” so as to entitle demandant to costs under 13 & 14 Vic., ch. 58, sec. 5. *Humphries v. Barnett*, 463.

2. *Evidence of assignment.*] *Held*, that upon the evidence in this case, the jury were justified in finding that the jury had assigned dower before action brought. *Humphries v. Burton*, 511.

— EJECTMENT.

See MORTGAGE.—NEW TRIAL, 1.

1. *Notice of Title—C. L. P. A., sec. 222.*]—Where in ejectment the plaintiff claimed as assignee of a mortgage made by defendant, and defendant by his notice claimed under a deed from the mortgagee. *Held*, that defendant might

shew that he was an infant when he executed the mortgage. *Grace v. Whitehead*, 50.

2. In notices of title in ejectment, under the C. L. P. A., secs. 222, 224, it is only necessary to state how the party claims, as by conveyance, descent, &c., and from whom, without exhibiting the whole chain of title. *Coltman et al. v. Brown*, 133.

3. Where a defendant in ejectment, by his notice, besides denying the plaintiff's title, claimed to hold under a lease. *Semble*, that he was entitled to shew an adverse possession by himself for twenty years in order to defeat the plaintiff's claim, although the effect might be to establish a title in himself of which he had given no notice. *Hill v. McKinnon*, 216.

— ELECTIONS.

No vote tendered for an hour during the first day—Votes afterwards received—Close of election.] On the first day of the election more than one hour elapsed without a vote being tendered, but afterwards, on the same day, votes were again received until four o'clock. The returning officer then declared the election closed, and refused to open the poll on the second day, in consequence of the time which had elapsed during the first day without a vote. *Held*, confirming the judgment of the county court, that the election was illegal. The meaning of the 12 Vic., ch. 81, sec. 159, is, that the poll shall be kept open on the first day till four, and if no votes come up for an hour after the last vote on that day, and if the returning officer sees that all the electors

have had a fair opportunity of voting, the election may then be closed. *Regina ex rel. Greely et al. v. Gilbert*, 263.

EMBEZZLEMENT.

See CRIMINAL LAW, 1.

EQUITABLE PLEADINGS.

See VENDOR AND VENDEE, 2.—

WOODSTOCK AND LAKE ERIE
R. W. Co.

ESTATE.

See DEED.—WILL, 2.

ESTOPPEL.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—MUNICIPAL CORPORATIONS, 1.—NOTICE TO PRODUCE.—REPLEVIN, 2.

Held, confirming *Doe McGill v. Shea*, 2 U. C. R. 123, that the deed in this case, given by the grantee of the crown before the patent had issued, being similar to the deed in question there, could not operate by estoppel. *Todd v. Cain et al.*, 516.

EVIDENCE.

See ARBITRATION AND AWARD, 3.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 7.—CRIMINAL LAW, 4.—DESCRIPTION.—EJECTMENT.—FRAUDS (statute of) 2, 3, 4.—INDEMNITY.—LIEN, 12.—LIMITED PARTNERSHIP.—MALICIOUS PROSECUTION.—NEW TRIAL, 1.—NOTICE TO PRODUCE.—SEAL.—WILL, 1.—WITNESS.

EXECUTION.

See LANDS—LIEN, 1.—PLEADING—

RAILWAYS AND R. W. COS., 6.
— VENDOR AND VENDEE, 8.

EXECUTOR.

Submission by—Power to bind him personally by award.]—See ARBITRATION AND AWARD, 4.

FALSE REPRESENTATION.

1. *Averment of Fraud—Pleading.*]—In an action for false representation of the credit of a firm, the statement complained of was that the partners were worth from four to five thousand pounds *between them*, out of which they owed defendant and others £1000; and the plaintiff, as a denial of this statement, alleged that they were not worth from four to five thousand pounds (not adding *between them*); and that they were not then indebted to the defendant and the other persons named in £1000, but in a much larger sum, namely, £3000. *Held*, that the denial of the worth of the parties referred to was not more extensive than the statement, and that it was sufficiently alleged that they were indebted in more than £1000. *Held*, also, that it was sufficient to allege that the defendant wrongfully and falsely made such statements, knowing them to be false, without adding *fraudulently*, for fraud is included in the allegation. *Held*, also, that in the declaration, set out, it sufficiently appeared that the plaintiff had given credit to the firm in question. *Fowler v. Benjamin*, 174.

2. *Pleading — Scienter.*]—The plaintiff declared that defendant, by falsely pretending and representing to the plaintiff that if the

plaintiff would go with his vessel to Willie's bay, for the purpose of carrying a load of defendant's wood thence to Cobourg, he would be able, by reason of the depth of water in said bay, to approach within a convenient distance from the shore, and load the wood on his vessel with scows—induced the plaintiff to go with his vessel to the said bay for that purpose, and to incur great expense, &c., whereas, the depth of water was not sufficient, &c. *Held*, on motion of judgment, 1. That the declaration was sufficient, without averring that defendant knew of the want of water. 2. That it sufficiently appeared that the defendant induced the plaintiff to go for the wood by his false representation, though no contract to carry was stated. *Harvey v. Wallace*, 508.

FENCES.

See RAILWAYS AND RAILWAY COS.,
1, 3, 5, 9.

FERRY.

Right of Crown to grant ferry—Lease during pleasure—Second lease of same ferry—Apportionment of rent—Use and occupation.]—The Crown, on the 23rd of February, 1838, granted a lease to D. of "our ferry across the river Detroit, from Windsor to Detroit," during pleasure, at an annual rent, payable on the 24th of June. On the 14th of March, 1843, a precisely similar lease of the same ferry was granted to B., and it was proved from that time B. had used the ferry greatly to D.'s injury. *Held*, that the second lease revoked the first: that D. was liable for rent only up

to the then last yearly day of payment mentioned in his lease; and that he was not liable for the use and occupation had afterwards. *Held*, also, affirming *Kerby v. Lewis*, 6 O. S. 207, that the Crown had clearly the right to grant an exclusive ferry across the Detroit river. *Regina v. Davenport*, 411.

FRAUD.

See ASSIGNMENT, 2, 4.—CHATTEL MORTGAGE, 2.—FALSE REPRESENTATION.—PLEADING.

FRAUDS (STATUTE OF.)

1. *Undertaking to answer for the debt of another—Statement of consideration.*]—The plaintiff had worked for W. in getting out certain timber, but had not been paid in full. Defendant afterwards employed the plaintiff to get the same timber to market, promising, in addition to his ordinary wages, to pay him the arrears due by W. *Held*, not within the Statute of Frauds as an undertaking to answer for the debt of another, but a new and original promise made upon a distinct consideration of benefit to defendant. *Tumblay v. Meyers*, 143.

2. *Guarantee—Statement of consideration—Pleading.*]—Defendant gave plaintiff the following guarantee: "I hereby become responsible to you for the payment of £120 17s. 6d., on the first day of April next, in case John Cooper fails in paying you that sum." In declaring on this the plaintiff alleged that J. C. was indebted to him in the sum named at the date of the guarantee, and that, in consideration of his giving time till the 1st of April, defendant promised to

pay then, &c. Defendant pleaded non-assumpsit. *Held*, that the plaintiff must be nonsuited, for the consideration stated was not supported by the instrument produced, and the plea put in issue the consideration as well as the promise. *Evans v. Robinson*, 169.

3. *Sale of goods—Proof of acceptance.*]—*Held*, in this case, where plaintiff sued for the price of a carriage which he had agreed to make for defendant, that upon the evidence set out, there was clearly no sufficient acceptance, within the statute of Frauds, and the 13 & 14 Vic., ch. 61. *Wegg v. Drake*, 252.

4. *Promise to pay the debt of another—Contract in writing.*]—Plaintiff had worked for M. & D. at their mill, and they owing him for wages, the plaintiff's father proposed to let them have a siding machine to put up in the mill, and that the plaintiff should work it until he had saved enough to pay his arrears, his wages while so engaged, and the price of the machine. Defendant, who was then about to purchase the mill from M. & D., agreed to this proposition, and he afterwards completed the purchase.—The machine was put up and worked by the plaintiff, and defendant afterwards promised to pay him his wages while so employed. *Held*, that by the arrangement defendant had assumed the arrears due to defendant by M. & D. as a debt of his own, and was liable without any written agreement; but *held* also, that his letters, set out below, sufficiently shewed a contract in writing. *Clark v. Waddell*, 352.

FREIGHT.

See LIEN, 1.

GAMBLING.

See ILLEGALITY.—LOTTERIES.

GRANT.

See FERRY.—SEAL.

GREAT WESTERN RAILWAY COMPANY.

Bridge across the Humber—Arbitration under 20 Vic., ch. 146—Claim by mortgages—Right to pay compensation awarded into court under 16 Vic., ch. 99, sec. 27—Attachment of debts—Application to Q. B. for money paid into C. P.]—The judgment debtors had leased from C. a lot of land on the River Humber, on which there was a stone quarry, and upon an arbitration under 20 Vic., ch. 146, the Great Western Railway Company were directed to pay them £255, as compensation for injury occasioned to them as such lessees by the erection of a permanent railway bridge over the river. Before the arbitration one of them, being then the sole lessee, had mortgaged to a building society his interest in the land, and all privileges as to quarrying stone contained in the lease; and the railway company, being notified by the society not to pay to the judgment debtors the amount awarded, paid it into the Common Pleas. The judgment creditors having obtained judgment in this court, attached the claim, and asked to be allowed to take the money out of court, or for an order on the company to pay it. *Held*, 1. That the money being in the Common Pleas, this court could not interfere; but that, if they had power to dispose of it, the mortgagees would be entitled before the judgment creditor. *Quere*, whether the company were authorised under

the 16 Vic., ch. 99, to pay such money into court. See note (a) to page 551. *Quære*, also, whether such a debt could be attached. *Preneh v. Lewis and Rowell—The Great Western Railway Company, Garnishees*, 547.

GUARANTEE.

See FRAUDS, (STATUTE OF,) 1, 2, 4.

HEIR.

See COVENANT.

HIGHWAY.

See RAILWAYS AND R. W. Cos., 5, 9.

1, 4 & 5 Vic., ch. 10—*Opening road by district council—Necessity for by-law—Evidence of dedication.*]

Under the 4 & 5 Vic., ch. 10, the district council could not open a new road except by by-law; and in this case, therefore, no by-law being shewn, it was held that the road was not sufficiently established. *Held* also, that upon the evidence there was nothing to shew a dedication. *Regina v. Rankin*, 304.

Disposal of original allowance—By-law—20 Vic., ch. 69.]

On application to quash a by-law authorising the conveyance to certain parties of an allowance for road, it appeared that a road intended to be in lieu of such allowance had been laid out in 1833, and constantly used since, but whether it had been legally established or not was doubtful: that conveyances had been actually executed in pursuance of the by-law, and that it had not been confirmed by any by-law of the county council, and was

therefore inoperative. The court, under these circumstances, refused to interfere. *In re Choate and Bletcher and the Municipality of the Township of Hope*, 424.

HORSE-RACE.

See ILLEGALITY.

ILLEGALITY.

See LOTTERIES—MUNICIPAL CORPORATIONS, 1.

Plaintiff and I made a bet upon a horse-race, and deposited the money with defendant as stakeholder. The bet was illegal, as neither of the parties owned either of the horses, and they were not running for any other stake. A. won, and the defendant paid over the money on his order, having been previously notified not to do so. *Held*, that the plaintiff might recover back the amount from defendant as money had and received. *Anderson v. Galbraith*, 57.

INDEMNITY.

See FRAUDS (STATUTE OF) 1, 2, 4.—

VENDOR AND VENDEE, 7.

Bond to indemnify sheriff for not selling under fi. fa.—Recovery against him in county court—Plea, that by paying he prevented an appeal—Evidence.]

A sheriff sued upon a bond of indemnity given him by defendant for not selling goods, alleging a verdict and judgment against him in the county court, which he had been obliged to pay. Defendant pleaded that he had defended the action for the plaintiff, and moved for a new trial, which was refused: that he then gave a bond to appeal,

according to the statute, and applied to the judge to certify the proceedings, but the plaintiff (defendant in that action), without notice to the defendant and against his will, paid the money, by means whereof defendant was prevented from prosecuting the appeal, and from procuring a stay of proceedings on the execution. It appeared that no bond had been given until the fifth day after the judgment was entered, and that the judge of the county court had on that ground refused to interfere. *Held*, that the plea was not proved, for the appeal was not prevented by the plaintiff's payment, as alleged, but by the entry of judgment. *Quære*, whether it formed a good defence. *Kingsmill v. Weller*, 479.

INDICTMENT.

See CRIMINAL LAW.

INNS.

See MUNICIPAL CORPORATIONS, 3.

INQUISITION.

Uncertainty.]—*Held*, that the inquisition in this case was bad, for the principal was not sufficiently charged either with manslaughter or murder; and it was intended to charge the others as aiding in, although they were said to have been present at the "murder aforesaid." *Regina v. Breden et. al.*, 487.

INSURANCE.

See CHATTEL MORTGAGE, 3.

1. *Covenant to Insure—Construction of—Measure of damages*]

—Covenant by lessee to insure the premises in the name of the lessor, the insurance money to be expended in the erection of new buildings. *Held*, a covenant running with the land, and that an action would lie on it against the assignee of the lessee. *Held*, also, that the measure of damages was the value of the premises lost to the plaintiff by defendant's neglect to insure, such value not exceeding the sum in which defendant was to have insured by his covenant; and that it could make no difference that on the failure of the lessee to insure the lessor was allowed by the lease to do so, and charge the premiums as rent. *Douglass v. Murphy*, 113.

2. *Re-insurance—Construction of Policy—Action brought too late—Computation of time.*]—Plaintiff having insured a steamer for £1500, re-assured with defendants for £500, under a policy which provided that no suit should be maintained thereon unless commenced "within the term of twelve months next after any loss or damage shall occur." The steamer was injured in November, 1854, and the plaintiffs, having paid the amount claimed on the 9th of August, 1855, brought this action on the 8th of August, 1856, to recover from the defendants their proportion. *Held*, too late, for that "the loss or damage" referred to in defendants' policy was the injury to the vessel, not the payment by the plaintiffs. Whether under the other construction the action would have been in time, was a question raised but not decided. *The Provincial Insurance Company v. The Aetna Insurance Company*, 135.

3. *Insurable Interest.*]—Where the plaintiff had contracted to purchase the property insured, and

had failed in making his payments punctually, but was proceeding in equity to compel performance by the vendor. *Held*, that he had an insurable interest. *Milligan v. Equitable Insurance Company*, 314.

4. *Second insurance—Interim receipt—Waiver—New trial.*—One of the conditions of an insurance policy was, that if there should be any insurance at any other office notice should be given, and the same indorsed on or stated in the policy, otherwise the first insurance should be void. *Held*, that an insurance effected in another office by an interim receipt, was an insurance within the condition; but as there was some evidence of a waiver of the notice required, which defendant could not take advantage of under his replication, the court, instead of ordering a non-suit on the leave reserved, granted a new trial with leave to amend. *Hatton v. The Beacon Insurance Co.*, 326.

5. The declaration stated that defendants, in consideration of £28 paid to them as the premium of insurance of £1500 on certain property described in the plaintiff's application, promised to insure him against loss by fire to the amount of £1500 until notified to the contrary, subject to the conditions of the policy—that is, the policy usually issued by defendants in like cases; that the property was destroyed by fire, and although the plaintiff had done all things necessary on his part, yet defendants had not paid him the sum insured. *Held* bad, the action for non-payment of the money not being maintainable without a policy under defendants' corporate seal. *Jones v. The Provincial Insurance Co.*, 477.

6. *Policy of Insurance—Right of action by assignee.*—An assignee of a policy of insurance cannot sue on it in his own name, although the company agree thereby to indemnify the assured and his assigns. *Beemer v. The Anchor Insurance Co.*, 485.

INTEREST.

See ARBITRATION AND AWARD, 3.

INTERPLEADER.

See DIVISION COURT.

JOINT STOCK COMPANIES.

1. *Action for calls—Stock taken by agent—Proof of authority.*—The defendant had taken shares in a road company, for which he subscribed his name; and more stock being required, the secretary called to solicit a further subscription. Defendant told him he would take another £100, and the secretary afterwards, in defendant's absence, put down his name for these shares. *Held*, not sufficient to charge defendant. The authority to take shares for another in such companies should be in writing, but *semble*, that a verbal authority would be binding. *The Ingersoll and Thamesford Gravel Road Company v. McCarthy*, 162.

2. The lessee of a road from a joint stock road company cannot maintain any action against the lessors for neglecting to keep their road in repair, and thus causing a diminution in the tolls, for, in the absence of any covenant in the lease, no such duty arises from the relation of landlord and tenant.

The 34th and two subsequent sections of 16 Vic., ch. 190, are intended for the protection of the public, and do not give any additional rights to a lessee of the road. *Watson v. The Sarnia Plank Road Company*, 228.

JUDGMENTS.

Sale of lands—Mortgage for purchase money—Judgments and executions against the purchaser]
—See VENDOR AND VENDEE, 8.

JURISDICTION.

See COUNTY COURT.

JURY.

See CLERK OF THE PEACE.--CRIMINAL LAW, 2.

LAND.

See COUNTY COURT.

Per *Burns, J.*—Lands acquired while the writ is in the sheriff's hands may be sold under it, if properly advertised, though they have not been twelve months owned by the debtor. *Ruttan v. Levisconte*, 495.

LANDLORD AND TENANT.

See COSTS.—DISTRESS.—FERRY.—INSURANCE, 1.—JOINT STOCK COMPANIES, 2.—LIMITATIONS (Statute of), 1.

Lease—Security for rent—Condition precedent.]—Defendant leased to the plaintiff certain premises, for three years from the 1st of May; and the plaintiff covenanted that, on or before the 1st of May, he would give to defendant two good and sufficient securities for the performance of the covenants in the lease on his part.

Held, that the giving such security was a condition precedent to the plaintiff's right of possession under the lease.—*Murphy v. Scarth*, 48.

LEASE.

See COSTS.--DESCRIPTION.--FERRY
—INSURANCE, 1.—LANDLORD AND TENANT.—RAILWAY AND R. W. COS., 8.—VENDOR AND VENDEE, 1.

LIBEL.

See SLANDER.

LICENSES.

For Taverns.]—See MUNICIPAL CORPORATIONS, 3.

LIEN.

See REPLEVIN, 1.

1. *Buffalo and Lake Huron Railway Co.*—*Lien for freight—Demand of too much*—19 Vic., ch 21—*Effect of.*]—Replevin for railway iron. It appeared that the iron had been imported from England by the Buffalo, Brantford and Goderich Railway Company, and was shipped from Kingston to Port Colborne, subject to ocean freight, and the freight by schooner from Kingston. On arriving at Port Colborne, no one being ready to pay, the iron was left by the master in defendant's charge, to hold subject to the freight, and was piled on a piece of ground belonging to Government, where other iron owned by the company was also lying, but separate from this. Afterwards the Buffalo and Lake Huron Railway Company (the plaintiffs) bought out the old com-

pany under the 19 Vic., ch. 21, and arranged certain writs of *fi. fa.* under which the sheriff had seized this and the other iron, and they thereupon demanded the iron in question from defendant, who refused to give it up, claiming the ocean freight, which had in fact been paid, and the freight from Kingston, as well as demurrage, and some other charges not recoverable. The plaintiffs, however, refused to pay any thing, and replevied. *Held*, 1st, That the iron could not be considered as having been delivered to the old railway company, when landed, as it was, at Port Colborne. 2nd. That the statute 19 Vic., ch. 21, did not take away the right of lien; nor could anything done by the sheriff have that effect. 3rd. That defendant having a clear right to detain for the freight from Kingston, of which no tender had been made, his right was not prejudiced by having demanded more than was due. *The Buffalo and Lake Huron Railway Company v. Gordon*, 283.

2. *Wharfinger—Payment.*]—In this case, where defendant claimed a lien on certain goods for wharfage, but it appeared that for many years, including the time when these goods came, defendant and plaintiff had been dealing together, and defendant had charged his claims for wharfage in account current, on which payments had been made from time to time. *Held*, that it was properly left to the jury to say whether the wharfage on the goods in question had been paid, and that they were justified in finding that it had been. *Boyd et al. v. Maitland*.

LIMITATIONS (STATUTE OF).

See EJECTMENT, 3.

1. *Agreement for sale of lands—Possession by vendee—Statute of Limitations.*]—A. entered into possession of land in 1833, and in 1834 made an agreement to purchase it from B., the owner, the purchase-money being payable by instalments, with interest, the last of which would fall due in 1839, when a deed was to be given. Nothing was said in the agreement about possession or the right to it, and A. continued to hold for more than twenty years without making any payment. *Held*, that A. was only tenant at will; that the will determined at the expiration of a year from the execution of the agreement; and that B., bringing ejectment in 1857, was barred by the statute. *Jones v. Cleveland*, 9.

2. *Rectory—Rector when barred—Effect of statute against grantee of Crown.*]—A rector is not barred by adverse possession of the glebe land for twenty years, unless he has been incumbent during the whole of that time. *Quære*, per Robinson, C.J., whether, when the Crown grants lands of which another is in possession, and continues in possession twenty years, the grantee who has never been in possession is barred. *Hill v. McKinnon*, 216.

3. 4 Wm. IV., ch. 1, sec. 17—*Construction of—Possession by grantee before patent.*]—The possession of land by a person deriving title from the Crown, which, under the 4 Wm. IV. ch., 1, sec. 17, will enable the statute to run against him, must be a possession *after the patent has issued*. In this case B. went upon the land for the purpose of performing the settlement duty, and conveyed to H. (from whom the plaintiff claimed): he then left the country, and the patent was after-

wards issued in his name. After B. left defendant took possession, and had continued more than twenty years, but there was no evidence that B., while patentee, knew of his being there. *Held*, that the plaintiff was not barred. *Quære*, whether B.'s occupation, merely for the purpose of performing settlement duty, would have been sufficient, even after the patent, to deprive him of the benefit of the statute. *Stewart v. Murphy*, 124.

LIMITATIONS OF ACTIONS.

See INSURANCE, 2.—LIMITATIONS (STATUTE OF).—RAILWAYS AND R. W. Cos., 3, 11.

LIMITED PARTNERSHIP.

Share of special partner not paid in cash—Admissions of liability—12 Vic., ch. 75, secs. 2, 4, 10.]— Under 12 Vic., ch. 75, secs. 2, 4, the money to be contributed by the special partners must be actually paid in cash, or they will be liable as general partners. Where the note was signed T. & Co., and it was asserted that the firm was a limited partnership, composed of T. as general and W. as special partner, but it appeared that W., when he gave the note, had represented to the payee that he was a partner, and had an interest in the business. *Held*, sufficient to warrant the jury in finding W. equally liable with T. *Watts v. Taft et al.*, 256.

LIQUIDATED DAMAGES.

Construction of agreement—Liquidated damages or Penalty.]—See VENDOR AND VENDEE, 9.

LOTTERIES.

1. 12 Geo. II., ch. 28—19 Vic., ch. 49.]—Plaintiff sold a tract of land to H., giving an agreement to convey on payment of the purchase money at certain periods, and H. re-sold it in lots by a lottery, which the plaintiff was aware of, but had nothing to do with. After the drawing it was arranged that the plaintiff, instead of H., should enter into agreements with the persons purchasing by the tirage to convey to them the lots which they had drawn on the terms there agreed upon, and that the sums payable by them should be received by the plaintiff on account of the purchase money due to him by H. In an action by the plaintiff on the covenant to pay contained in one of such agreements, *held*, that the sale by lottery was illegal, under the 12 Geo. II., ch. 28, which must be treated as in force here at the time of such sale, notwithstanding our act, 19 Vic., ch. 49; and that the agreement declared upon, being an adoption of such sale, could not be enforced. *Cronyn v. Widder et al.*, 356.

2. The imperial statute against lotteries, 12 Geo. II., ch. 28, held to be in force in this country. *Corby v. McDaniel et al.*, 378.

MALICIOUS ARREST.

See ARREST.

MALICIOUS PROSECUTION.

*Proof of information—Necessity for arrest—Termination of Proceedings.]—*In an action for malicious prosecution for felony before magistrates, it is not necessary to prove that defendant laid an in-

formation on oath, where that is not averred in the declaration: it is enough to shew that he set the magistrates in motion; nor is it indispensable to sustain such action that the party charged should have been arrested or imprisoned. In this case the plaintiff, on receiving the magistrate's summons, attended in obedience to it. The charge of felony made against him by defendant was dismissed; but the magistrates thought he had been guilty of a misconduct in the same matter, and he was requested to attend on another day, to which they adjourned for the purpose of considering that point. *Held*, that the determination of the proceedings with regard to the charge complained of was sufficiently shewn. *Sinclair v Haynes*, 247.

MEASURE OF DAMAGES.

See CONTRACT.—INSURANCE.—
NEW TRIAL.—TELEGRAPH COM-
PANY.—VENDOR AND VENDEE, 3.

MERGER.

See BILLS OF EXCHANGE AND PRO-
MISSORY NOTES, 3.

MONEY HAD AND RE- CEIVED.

See ASSIGNMENT---ILLEGALITY.

Illegal payments authorised by resolution—recovery by council of succeeding year—Money had and received—Evidence of Illegality as to the different items—Payment for attendance as councillors.]—In an action for money had and received, brought by the municipality of a township for 1857, against

the defendant, who had been Reeve in 1856, it appeared that at a meeting of the council in that year, defendant being in the chair, it was resolved: 1. That the treasurer should pay defendant the sum of £129, "for moneys advanced—attending commission—salary as concillor for 1856—for defending Chancery suit, &c." 2. That the defendant should be authorised to sign an order on the Treasurer to pay certain witnesses called by the council their expenses attending the commission, and paying other township officers, &c., not already paid by order on the treasury. 3. That the Reeve should give an order on the treasurer for £10 10s., in favour of N., for services as township clerk. It was proved that the treasurer paid the £129 to defendant: that the commission mentioned was held under 12 Vic., ch. 81., sec. 181, to examine into the financial affairs of the township: that the suit referred to had been brought by one C. respecting the affairs of the township; but the clerk swore that no documents had come into his possession shewing for what the moneys paid to the defendant had been expended, and no evidence was given to shew what portion of the £129 had been received for his attendance in the council. There had been no by-law to authorise any of these payments. *Held*, that upon this evidence it should have been left to the jury to say how much, if not all, of the £129 was an illegal payment; and that the resolution, though not quashed, would be no defence. With regard to the different items mentioned in the resolutions—*held*, as to the "moneys advanced," that nothing could be recovered without shewing that the payment made by defendant was illegal. As to the

charge for "attending commission," that it was *prima facie* illegal, and the defendant should have shewn his right to it. That any payment to defendant for attendance at council was clearly illegal, and could be recovered in this form of action by the council of the succeeding year. *Semble*, also, that the treasurer might be indicted for making such payment. As to the money paid for defending the suit, that it should have been shewn that there was some reasonable ground of defence, and authority by by-law to defend. As to the second resolution, that the moneys drawn under it must be proved to have been paid to defendant, and not to the witnesses and officers. As to the third resolution, that as there was no evidence of illegality in the payment nothing could be recovered.—*The Municipality of East Nissouri v. Horseman*, 576.

MONEY PAID.

See COSTS.—VENDOR AND VENDEE, I.

Agent acting for plaintiffs and defendants -- Misappropriation of defendants' funds--Application of plaintiffs' money to make up the deficiency -- Right of action by plaintiffs.]—One S. was treasurer of the county of Middlesex and agent of the Gore Bank, having his office for both purposes in the same building. The Council had no account with the bank, and did not direct S. where to keep his funds as treasurer, and he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, without the knowledge of the counsel, and having misapplied the moneys of the council, overdrew that account without the knowledge or authority

of the bank, nearly £8,000, for the purpose of paying debts due by the county for interest on debentures and other claims, which he ought to have paid out of the moneys received by him as treasurer. The coupons on some of these debentures were stamped by S. as paid by the Gore Bank.—S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use. *Held*, that no portion of it could be recovered.]—*The Gore Bank v. The Municipal Council of the County of Middlesex*, 593.

MORTGAGE.

See CHATTEL MORTGAGE.—GREAT WESTERN R. W. CO.—NEW TRIAL.—VENDOR AND VENDEE, I, 2, 7, 8.

Taken as collateral security for a Note.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

Proviso for notice in writing demanding payment---Notice signed by attorney---Proof of authority.]—Where a mortgage provided that no means should be taken by the mortgagee to obtain possession of the land, until he should have given to the mortgagor one calendar month's notice in writing after default made, demanding payment. *Held*, in ejectment by the mortgagee, that a notice signed by the plaintiff's attorney, who was also his attorney in a suit brought upon the covenant more than a month before this action, was sufficient, without any proof of authority. *Keyworth v. Thompson*, 178.

MUNICIPAL CORPORATIONS.

See HIGHWAY.—SCHOOLS.

Action for obstructing proceedings of

commissioners under 12 Vic., ch. 81, sec. 181.]--See ACTION.

1. *Illegality of by-law pleaded to action on debentures---How far a defence against bona fide holder---Repleader---Appeal---8 Vic., ch. 13, sec. 67.]--*The plaintiff sued a municipal corporation on two debentures issued by them. Defendants pleaded that the debentures were issued under a by-law, which was illegal for want of compliance with the directions of the statute, and that the debentures therefore were not binding on them. The plaintiff replied that he was a *bona fide* holder for value, and without notice of the illegality; and upon the issue the jury in the County Court found in the plaintiff's favour. The learned judge refused to grant a re-pleader, and upon appeal—*held*, that he was right, for a re-pleader is granted only to advance substantial justice. *Quære*, whether the refusal to grant a re-pleader is an appealable matter. *Anglin v. The Municipality of the Township of Kingston*, 121.

2. *Tavern licenses---What duty may be imposed without reference to electors---Imperial duty---Fees of officers---16 Vic., ch. 184, sec. 4.]--*A by-law requiring the payment of £10 for an inn license, over and above the imperial duty of £2 5s. currency, need not be approved of by the electors under 16 Vic., ch. 184, sec. 4, for that clause applies only to by-laws imposing a fee of more than £10 *exclusive of the imperial duty*. Fees directed to be paid to the treasurer and inspector, are not to be considered as part of the duty on the license. *In re Harrison and the Town Council of the Town of Owen Sound*, 106.

3. *Corporation — Liability for work—Authority of Committee---*

*Countermand --- Corporate Seal---Appeal.]--*The Municipal Council for 1856 passed a resolution that certain work should be done, for which a verbal tender was made by the plaintiff to the street and sidewalk committee, and accepted in writing by a majority of the Committee, after the last meeting of the council in 1856, and without the tender having been submitted to the Council, or any written contract executed. In April, 1857, some time after the plaintiff had commenced the work, the Council passed a resolution notifying him not to proceed, but he went on notwithstanding, and completed it, and in this action brought for the price, a verdict was taken for the plaintiff, with leave reserved to enter a verdict for defendants, unless the whole amount claimed could be recovered. *Held*, affirming the judgment of the court below, that the plaintiff could not recover. *Held*, also, that an appeal would lie from the decision of the judge below on a verdict so taken. *McLean v. The Town Council of the Town of Brantford*, 347.

4. *By-law—Interest of applicant—Publication.]--*An owner of real estate which has been assessed is entitled to move against a by-law, though his name does not appear on the roll. It is sufficient, under 14 & 15 Vic., ch. 51, sec. 18, that the manner of ascertaining the consent of the electors should be prescribed by a notice attached to the proposed by-law when published, though the act says that it shall be determined *by the by-law*. The same act directs that a copy of the by-law shall be inserted at least four times in each newspaper printed within the limits of the municipality, but the court refused to quash a by-law, under which a

large sum had been borrowed, because it had been published three times only in one of two papers. A full copy of the by-law in this case was not published, but at the time of passing a clause was added appointing the day on which it should come into operation, and directing that the debt should be payable within twenty years from that day, while in another clause the debentures were made payable in twenty years from their dates. The court, however, *held*, that whether the provisions of the 14 & 15 Vic., ch. 51, sec. 18, sub-sec. 3, or of the 16 Vic., ch. 22, sec. 2, sub-sec. 4, were to govern, this was an irregularity for which they were not bound to quash. *Boulton and The Town Council of the Town of Peterborough*, 380.

MUNICIPAL ELECTIONS.

See ELECTIONS.

MUTUAL INSURANCE COMPANY.

See CHATTEL MORTGAGE, 3.

NEW TRIAL.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—CONTRACT, 4.—CRIMINAL LAW, 4.—INSURANCE, 4.—REPLEVIN, 2.—SLANDER.

1. *Mistake at trial--Dishonest defence.*—Plaintiff sold to E. and took back a mortgage, which he neglected to register, and in the meantime E. sold to defendant, who recorded his deed first. In ejectment brought on the mortgage, defendant objected to the want of registry,

but closed his case without having put in and proved the plaintiff's deed to E., to shew that the title was a registered one when defendant got his deed. The learned judge at the trial would not allow the defence to be re-opened; and as it appeared that the defendant was aware of the mortgage when he purchased from E., and was therefore setting up a dishonest defence, the court refused to interfere. *Blakely v. Garrett*, 261.

2. New trial granted for excessive damages, in an action brought by an administratrix, under 10 & 11 Vic., ch. 6, to recover damages for the death of the intestate, caused by a railway accident. *Morley, Administratrix of Morley v. The Great Western Railway Company*, 504.

NOTICE OF ACTION.

Path-master--Proof that defendant acted bona fide—14 & 15 Vic., ch. 54, sec. 9.]—In this case, the defendant being path-master, and assuming to act as such, moved the plaintiff's fences, the effect of which was to take off land from the plaintiff's lot and add it to the defendant's. It was left to the jury to say whether defendant acted *bona fide* in the execution of his duty, and they having found that he did, the court refused to disturb the verdict. *Helliwell v. Taylor*, 279.

NOTICE TO PRODUCE.

Form of--Evidence--Letters--Estopped.]—Plaintiff sued defendant for the price of some fruit trees, and the defence was that they had not been purchased by defendant, but received to sell upon commis-

sion for the plaintiff. Defendant had given a notice to produce "the several documents hereunder specified, and all other documents, letters," &c., "relating to the matters in question in this cause:" the schedule specified all letters, &c., "and particularly certain orders given by defendant to plaintiff to forward the trees which the defendant was to sell for the plaintiff under the agreement between them, and which orders are dated in or about March, 1856." *Held*, sufficient to let in secondary evidence of a letter written by defendant to plaintiff in March, requiring trees to be sent by a certain time. *Held*, also, that defendant having put in a letter from the plaintiff to establish that he had received the trees for sale, was not bound by the plaintiff's statement in the same letter of the amount due for such trees. *Leslie v. Morrison*, 130.

NOTICE OF TITLE.

See EJECTMENT.

ONTARIO, SIMCOE AND HURON R. W. Co.

See RAILWAYS AND RAILWAY COS., I.

PARTNERSHIP.

See LIMITED PARTNERSHIP.

*Promissory note—Indorsement by one partner of partnership nam as sureties--Proof of his authority.]—*The plaintiff having a claim against M., agreed to give him time, on receiving a good indorsed note, and M. sent him a note, made by himself, payable to W. M. or order, and indorsed by W. M. and

by the firm of "J. and J. Carveth." The plaintiff took the note before it was due, knowing nothing of the circumstances under which it was indorsed by the firm, or of the authority of James Carveth, who indorsed it, to use the partnership name. When it fell due, James Carveth being absent from the country, the plaintiff sued the other partner, John. *Held*, that he was entitled to recover. *Henderson v. Carveth*, 324.

PATENT (FOR LAND).

See SEAL.

PATH-MASTER.

See NOTICE OF ACTION.

PAYMENT.

See LIEN, 2.

To be made monthly on contract to saw logs—When non-payment will entitle defendant to abandon the contract.]—See CONTRACT, 4. *By cheque.]—See* VENDOR AND VENDEE, 5.

PAYMENT INTO COURT.

See GREAT WESTERN RAILWAY Co.

PERJURY.

See SLANDER.

PENALTY.

Construction of Contract—Liquidated damages or penalty.]—See VENDOR AND VENDEE, 9.

PLEADING.

See CONTRACT, 1, 3.—CRIMINAL LAW, 1, 2.—FALSE REPRESENTATION.—INDEMNITY.—PRINCIPAL AND SURETY.—RAILWAYS AND R. W. COS., 1, 3, 4, 8, 10.—REPLEVIN, 1.—SET OFF.—TAXES, 2.—VENDOR AND VENDEE, 7.

Suit by coroner on note seized under execution --- Pleading --- 20 Vic., ch. 57, sec. 22.]—The plaintiff, as coroner, sued upon a note made by defendant, payable to B. or order, alleging that while it remained unpaid, one M. recovered a judgment against B., C. and D., and issued a *fi. fa.* directed to the plaintiff, under which he seized the note. Defendant pleaded, that after the making of the note, and before this suit, B. being the owner and holder of said note, delivered it to C. to receive the amount thereof, and pay with it a demand made by the owners of a certain vessel against B. & Co., and hand over the residue to the Commercial Bank. And further, that in the suit in which said judgment was recovered, an order was made for defendants to appear and be examined before the judge of the county court as to the debts due them, &c., and the note was then filed in the Court of Common Pleas; that the plaintiff and M. had notice of the premises, and said note was taken out of the said court by the fraud of the plaintiff, and others in collusion with him, and the plaintiff, at the commencement of this suit, was the holder of said note by fraud. *Held*, on demurrer to the plea, declaration good, for it must be assumed that the writ was properly directed to the coroner, as it might be under 20 Vic., ch. 57, sec. 22. Plea bad, as shewing no defence. *Brown v. Gordon*, 342.

POSSESSION.

See CROWN LANDS.—LANDLORD AND TENANT. --- LIMITATIONS (STATUTE OF).---MORTGAGE.

Actual and continued change of.]---

See ASSIGNMENT, 3, 4.--DISTRESS.

By Vendee under contract of Sale.] ---
---*See* LIMITATIONS (STATUTE OF.)

PRACTICE.

See COUNTY COURT. --- CRIMINAL LAW, 4, --- DEMURRER. --- DIVISION COURT. --- DOWER, 1. --- EJECTMENT. --- GREAT WESTERN R. W. CO. --- NEW TRIAL. --- NOTICE TO PRODUCE. --- SLANDER.

PRINCIPAL AND AGENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2. --- JOINT STOCK COMPANIES, 1. --- MORTGAGE. --- MUNICIPAL CORPORATIONS, 3. --- PARTNERSHIP. --- RAILWAYS AND R. W. COS., 1.

Agent for sale of goods-- When liable on common counts.]—*Held*, that upon the evidence in this case, set out, the defendant, who had acted as agent for the plaintiff in selling trees, could not be held liable on the common counts for the trees sold, but must be sued specially for not accounting. *Leslie v. Morrison*, 318.

PRINCIPAL AND SURETY.

Bond—Non-execution by one of three obligors named—When a defence for co-surety—Variance—Pleading.]—The plaintiffs sued defendants H. & D. as having jointly executed a bond to secure payment of rent by H., which being set out in the plea, it appeared that

T. was also named in it as obligor, but had not executed. It appeared that at the execution of the bond T. was not present, and defendant D. told the plaintiffs that he could not conveniently attend, but would sign it at any time. T., however, afterwards, on being applied to by the plaintiffs, refused to execute, and no objection had been made by D., although aware of the refusal. *Held*, that the non-execution by T. was no defence under a plea of *non est factum* by H., as shewing a variance between the bond declared on and that set out. *Held*, also, that under the circumstances D. was not relieved from liability by T. not having executed the bond. *Sidney Road Company v. Holmes and Davis*, 268.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY.

Agreement to take timber in payment on the building contract—Property in such timber when delivered.]—See CONTRACT, 2.

Sale of goods—Effect of delivery in vesting property.]---See VENDOR AND VENDEE, 4.

Agreement to make bricks for plaintiff--When property vests.]---See VENDOR AND VENDEE, 6.

RAILWAYS AND RAILWAY COMPANIES.

See NEW TRIAL, 2.

1. *Ontario, Simcoe and Huron Railroad Company*---Obligation to fence---Pleading---Notice to fence.]

—Declaration against the Ontario, Simcoe and Huron Railroad Company, alleging that the plaintiff's horses were lawfully upon certain land belonging to one M., out of which the defendants had taken a strip for their road: that the proprietor of said lands desired them to fence off the land so taken from his land, yet defendants neglected to do so, by means whereof the plaintiff's horses, then being upon said land, escaped therefrom on to the railway, and were killed by the train. *Held*, on demurrer, declaration bad, as it was not averred that the horses were on the land with the consent of the owner, and defendants therefore were not liable.—Upon the trial, it appeared that M.'s land, from which the plaintiff's horses got upon the track, was altogether unenclosed, but that they were there by M.'s consent, the plaintiff having agreed to pay her a small sum for their pasturage. *Held*, that the company were not liable.—A notice to fence, given by letter written by M.'s son, who acted for her in such matters, to the superintendent of the company. *Held*, sufficient. *Auger v. The Ontario, Simcoe and Huron Railway Company*, 92.

2. *Arbitration*—14 & 15 Vic., ch. 51, sec. 11.—Appointment of third arbitrator.]---Plaintiff and defendants each appointed an arbitrator, under 14 & 15 Vic., ch. 51, sec. 11, to value certain lands of the plaintiff required by defendants for their railway. The two arbitrators, not being able to agree, upon a third, went to the judge of the county court, who upon their application appointed a third. No notice was given to the railway company of the intention to make such application, but it appeared that the arbitrator appointed by

them was their general agent for obtaining the land required for the right of way: that on three other occasions the judge, acting on his request as representing the company, had made similar appointments, and on one the defendants had paid the amount awarded. The arbitrator, however, swore that he had no authority to apply to the judge in this case, and that on the other occasions his proceedings were sanctioned by the solicitor for the company. The plaintiff having sued the company upon the award made—*held*, that the third arbitrator was properly appointed; and the award was sustained. *Daly v. The Buffalo and Lake Huron Railway Company*, 238.

3. 14 & 15 Vic., ch. 51, sec. 13.—*Construction of — Obligation to fence.*—Sub-sections 1 and 2 of 14 & 15 Vic., ch. 51, sec. 13, are distinct provisions, passed with different objects. The first is to compel the company to fence in *their track*, so that cattle may not get upon it and be injured by the trains: non-compliance renders them liable for any such injury, but this clause does not apply until the railway is in use. The second is to provide for the separation, not only of the track, but of all lands taken by the company, from the lands of adjacent proprietors, so that the latter may not be subject to trespasses by cattle escaping from the company's lands; this clause may apply before the railway is in operation, but not until six months after the company have taken the land, and been requested to fence it.

Where, therefore, a declaration charged that defendants built their railway over the plaintiff's land, but neglected to fence as directed

by sub-section 1, whereby cattle broke in and destroyed his crops, but it was not averred that the plaintiff had requested them to fence, nor that the six months had elapsed. *Held*, that no cause of action was shewn, for the injury was one within sub-section 2, and these averments were essential. *Elliott v. Buffalo and Lake Huron Railway Company*, 289.

4. The declaration in this case was the same as in *Elliott v. This Company*, page 289, but charged, as additional damage resulting from the same breach of duty, that by reason thereof a steer and heifer of the plaintiff got upon the railway, and were killed by an engine of the defendants running thereon. *Held*, bad. *Ferguson v. The Buffalo and Lake Huron Railway Company*, 296.

5. *Neglect to maintain cattle-guards—Ox escaping from highway—Liability*—14 & 15 Vic., ch. 51, sec. 13.]—Declaration charged defendants with neglecting to maintain cattle-guards, by means whereof the plaintiff's ox, lawfully being on the said highway, got upon the railway, and was killed by the train. It appeared that there were no cattle-guards at the time of the accident, and that the ox got from the highway on to the track. *Held*, affirming the judgment of the court below, that in the absence of cattle-guards, defendants, under 14 & 15 Vic., ch. 51, sec. 13, were liable, without reference to the question whether the ox was lawfully on the highway or not. *Huist v. Buffalo and Lake Huron Railway Company*, 299.

6. *Buffalo B. & G. R. W. Co.—Sale to plaintiffs*—19 Vic., ch. 21.—*Claim under division court execu-*

tions.]—On the 18th of March, 1855, the Buffalo, Brantford and Goderich Railway Company mortgaged the goods in question to Her Majesty, to secure £15,000; and on the 17th of April, 1855, they executed a second mortgage of the same property to other parties. These mortgages were duly filed. On the 20th of February, 1856, an execution was issued at the suit of Her Majesty for the same debt, on which the property was seized, and afterwards other executions came. The sheriff put defendant, who was a bailiff of a division court, in possession on the 29th of April, 1856, to hold, first, on account of the sheriff, and next on account of several executions which defendant had in his hands from division courts. On the 11th of February, 1856, the Buffalo, Brantford and Goderich Railway Co. sold out to the Buffalo and Lake Huron Railway Co., which was confirmed by the 19 Vic., ch. 21; and that company having arranged the executions, the sheriff afterwards delivered possession to their agent of the property at Brantford, in the name of the whole. Defendant however claimed to hold, notwithstanding, under the division court executions. These executions were all subsequent to the sale made on the 11th of February, 1856, and had expired before the sheriff gave up possession. The plaintiffs (the Buffalo and Lake Huron Railway Company) having replevied from defendant—*Held*, that they were entitled to recover. *The Buffalo and Lake Huron Railway Company v. Brooksbanks*, 337.

7. *Great Western Railway Company*--Goods received to be forwarded to New York--Conditions referred to in receipt--Delay beyond defendants' line--Liability.]--Defen-

dants were charged with negligence and delay in the carriage of certain furs belonging to the plaintiff, from Toronto to New York, in pursuance of their contract. Defendants' railway extended only to Suspension Bridge, and it appeared that the goods were delivered to them, addressed to R., at New York, and receipt given, which specified that they were received to be forwarded to such address, subject to their tariff, rules and regulations. In these conditions it was stated that, when goods were intended, after being conveyed by their railway, to be forwarded by other means to their destination, the company would not be responsible after they were so delivered. The goods were sent on by defendants to the Suspension Bridge, and there delivered to the New York Central Railroad Company, which placed them in the bonded warehouse of the American customs, until certain documents were procured, without which they could not be sent on. The plaintiff was asked by defendants for such papers, but they were not furnished for some time, and the furs were spoiled by the delay. *Held*, that there was no contract by them to convey the goods to New York as alleged, but their undertaking was only to carry them over their own line, and deliver them to the company which was to take them on.---*Rogers v. The Great Western Railway Company*, 389.

8. *Covenant to maintain crossings*--Action thereon--Lease of the land by plaintiff---Pleading.]---To an action on a special agreement for not maintaining proper crossings for the plaintiff, whose lands had been separated by the railway, and for not keeping up the cattle-

guards and fences connected with such crossings, defendants pleaded that the agreement was executed by them for the benefit of the plaintiff, his executors, administrators and assigns, for the time being the occupants of said land, and that during the whole continuance of the grievances complained of, one J. T. and others were possessed to their own use, and to the exclusion of the plaintiff, of said land on each side of the railway, for divers terms of years, under leases executed by the plaintiff before the commencement of said grievances. *Held*, no defence. *Hugo v. The Great Western Railway Company*, 506.

9. *Horse getting on track from highway*—20 *Vic.*, ch. 12, sec. 16.]—In an action against a railway company for not erecting fences and cattle-guards, whereby the plaintiff's horse got on the track and was killed, there was evidence to shew that the horse escaped from the plaintiff's field into the street within half a mile of the railway, and thence upon the track. *Held*, that if so the plaintiff was precluded from recovering by the 20 *Vic.*, ch. 12, sec. 16, though the horse was not killed at the very point of intersection. *Ferris v. The Grand Trunk Railway Company*, 474.

10. *Great Western Railway Co.*—Action against for taxes—Pleading—Want of notice—16 *Vic.*, ch. 182, secs. 8, 21.]—The declaration stated that a tax, amounting to £128, was duly assessed against defendants, for the year 1856, of which they had due notice, yet defendants, although said sum had been duly demanded of them, refused to pay the same. Defendants, as to £6 15s. 5d., pleaded payment into court, and except as to that sum, that the assessors for

the year did not deliver, or transmit by post to any station or office of defendants, a notice of the total amount at which they had assessed defendants' real property in the municipality, distinguishing the value of the land occupied by the road and the value of all defendants' other real property. *Held*, a good defence. *The Municipality of the Township of London v. The Great Western Railway Company*, 500.

11. *Damages caused by Railway*—Limitation and right of action—Conveyance to company by plaintiff's vendor.]—The plaintiff sued the Grand Trunk Railway Company, alleging that their road passing through his land obstructed the flow of water which used to escape along a ravine, and thereby flooded several acres of his farm, and made his residence unhealthy and unfit to live in. There was no natural stream through the ravine; and no negligence was complained of in the construction of the railway. It appeared that the plaintiff had purchased from one B., who, in 1854, had conveyed to defendants the track, and given a receipt in full for the purchase money, and for all damages occasioned by the railway passing over his land. *Held*, that the action could not be maintained. *Wallace v. The Grand Trunk Railway Company of Canada*, 551.

RECOGNIZANCE.

See ARREST, 2.—BAIL.

REGISTRATION.

See VENDOR AND VENDEE, 8.

RENDER.

See ARREST, 2.

RENT.

Apportionment of.]—See FERRY.

REPLEADER.

Refusal to grant—How far an appealable matter.]—See MUNICIPAL CORPORATIONS, I.

REPLEVIN.

1. 14 & 15 Vic., ch. 64—*Detinue—Lien—Pleading.*]—Where the goods have been replevied under the 14 & 15 Vic., ch. 64, and the declaration is for detaining merely, the pleadings should be as in *detinue*. In such an action a lien cannot be given in evidence under a plea denying the plaintiff's property. *Stevens v. Cousins*, 329.

2. *Second replevin of same goods—Contradictory evidence—Inconsistent verdicts—Verdict against a wrong doer—New trial refused.*]—H. owned certain land, off which the plaintiff in this case had wrongfully cut and carried away a number of oak staves, and left them upon the bank of a creek not far off. H. replevied, describing the number of staves in the writ as 10,900, and the bailiff under it seized all that were lying together on the bank, believing them to be about 7,000, leaving out only a small number that were scattered. H. then sold to defendants all the staves thus replevied, and afterwards the plaintiff took out a writ of replevin against defendants for 6,000 staves, and under it seized that number from the staves so sold. Both actions of replevin

were tried at the same assizes, and in that brought by H., which was disposed of first, the jury found that only 2,730 of the staves belonged to him as having been cut on his land. On the trial of this case, it was sworn that the number of staves on the bank when the first writ was executed exceeded 15,000, and the plaintiff gave evidence to shew that most of the staves then there had not been cut on H.'s land. It appeared, however, that a considerable quantity had been shipped and sent off by persons in privity with the plaintiff; but the evidence on these points was contradictory. The jury were directed to ascertain how many staves had been taken from H.'s land, as to which the verdict in the other case was not conclusive, and that, as defendants claimed only as his vendees, the plaintiff was entitled to a verdict for any others that there might have been. They found, however, for defendants, and the court refused to interfere, holding that the plaintiff having been clearly a wrong-doer in trespassing on H.'s land, was not entitled to consideration. *Sills v. Hunt et al.*, 521.

REPRESENTATION.

See FALSE REPRESENTATION.

REVOCATION.

See ARBITRATION AND AWARD, 5.—FERRY.

ROAD.

See HIGHWAY.—JOINT STOCK COMPANIES.

RULES.

Under the Criminal Appeal Act.—

See CRIMINAL LAW.

SALE OF GOODS.

See VENDOR AND VENDEE, 4, 5, 6, 9.

SALE OF LANDS.

See CROWN LANDS—VENDOR AND VENDEE, 1, 2, 7, 8.

SCHOOLS.

See TAXES, 1.

By-law altering Union School sections—Omission of notice—By-law to levy rate—13 & 14 Vic., ch. 48, sec. 18, sub-sec. 4—16 Vic., ch. 185, sec. 1—14 & 15 Vic., ch. 109, sec. 4.—The Municipality of Vespra and Sunnidale, before the 16 Vic., ch. 185, passed a by-law remodelling the school sections of those townships, which transferred to Union School section No. 3, created by the by-law, a part of Vespra, which had formerly belonged to Union School section number 4 of Vespra, Flos, Oro, and Medonte. *Held*, that this was beyond the power of the municipality, and that the by-law was bad. It appeared also that no notice had been given of the intended alteration, and on this ground as well the by-law was illegal. *Held*, also, that as section No. 3 was illegally constituted, a by-law passed to raise money for a school-house erected there was also bad; and the by-law in this case passed for that purpose was bad, too, for emitting to comply with the requisites under 14 & 15 Vic., ch. 109, sec. 4, of all by-laws creating a debt or contracting a loan.

Hart and the Municipality of Vespra and Sunnidale, 32.

SEAL.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.—INSURANCE, 5—MUNICIPAL CORPORATIONS, 3.

The want of a seal to a patent when produced at a trial is not a fatal objection, if it is clear upon inspection that it has once been sealed. *Todd v. Cain et al.*, 516.

SET-OFF.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

Cheque—Set-off—Pleading.—To an action on a cheque by the bearer against the maker, defendant pleaded that the cheque was given to one B., who had always been the lawful holder thereof, and that the plaintiffs held the same as his agents; that it was given for bills of exchange drawn by B. on H. & Co., and since overdue and dishonoured, whereof B. had notice: that the cheque was held by plaintiffs as B.'s agents, and B. was liable to pay defendant, as drawer of said bills, the amount of said cheque, and defendant offered to set off the same. *Held*, on demurrer, plea bad, for not alleging that the bills were dishonoured before the commencement of this suit. *Wood et al. v. Stevenson*, 527.

SHERIFF.

See INDEMNITY.—LANDS.—TAXES, 2.

SLANDER.

Perjury—Arrest of Judgment—

Words imputing to the plaintiff the having taken a false oath, but not in any judicial proceeding, or on any occasion where it would be an offence in law, are not actionable; but where the jury on such a charge gave £2 10s. damages the court refused a new trial in order to give defendant his costs, but arrested the judgment. *Hogle v. Hogle*, 518.

SPECIAL JURY.

See CLERK OF THE PEACE.

STATUTES (CONSTRUCTION OF).

29 Car. II., ch. 3.—See Frauds (statute of).

12 Geo. II., ch. 28.—See Lotteries, 1, 2.

4 Wm. IV., ch. 1, sec. 17.—See Limitations (Statute of).

7 Wm. IV., ch. 3, sec. 29.—See Arbitration and Award, 5.

4 & 5 Vic. ch. 10.—See Highway, 1.

8 Vic., ch. 13, sec. 13.—See County Court.

8 Vic., ch. 13, sec. 57.—See Municipal Corporations, 1.

8 Vic., ch. 45.—See Criminal Law, 2.

10 & 11 Vic., ch. 6.—See New Trial, 2.

12 Vic., ch. 74.—See Assignment 2.

———ch. 75.—See Limited Partnership.

12 Vic., ch. 76.—See Bills of Exchange and Promissory Notes, 8, 9.

12 Vic., ch. 78.—See Commission for taking affidavits.

12 Vic., ch. 81, sec. 159.—See Elections.

———sec. 181.—See Action, Money had and received.

13 & 14 Vic., ch. 45.—See Criminal Law, 2.

13 & 14 Vic., ch. 53, sec. 102.—See Division Court.

13 & 14 Vic., ch. 58.—See Dower, 1.

13 & 14 Vic., ch. 61.—See Frauds (Statute of).

13 & 14 Vic., ch. 62.—See assignment, 2.—Chattel Mortgage, 1.

14 & 15 Vic., ch. 5. See Commission for taking Affidavits.

14 & 15 Vic., ch. 51, sec. 18.—See Municipal Corporations, 4.

14 & 15 Vic., ch. 54.—See Notice of Action

14 & 15 Vic., ch. 94.—See Bills of Exchange and Promissory Notes, 4.

16 Vic., ch. 19, sec. 5.—See Will, 1.

16 Vic., ch. 22.—See Municipal Corporations, 4.

16 Vic., ch. 99, sec. 27.—See Great Western R. W. Co.

16 Vic., ch. 159.—See Crown Lands.

16 Vic., ch. 177, sec. 7.—See Division Court.

16 Vic., ch. 182.—See Taxes, 2.

16 Vic., ch. 184.—See Municipal Corporations, 2.

16 Vic., ch. 190.—See Joint Stock Companies, 2.

18 Vic., ch. 21.—See Taxes, 1.

19 Vic., ch. 21.—See Lien.

19 Vic., ch. 43, (Common Law Procedure Act, 1856.) sec. 88.—See Arbitration and Award, 1.

———sec. 97.—See Arbitration and Award, 5.

———secs. 222, 224.—See Ejectment.

———sec. 291.—See Bond.

19 Vic., ch. 49.—See Lotteries.

19 Vic., ch. 74.—See Woodstock and Lake Erie R. W., &c., Co.

19 Vic., ch. 90, sec. 20.—See County Court.

19 Vic., ch. 92.—See Clerk of the Peace.

19 Vic., ch. 121.—See Criminal Law, 1.

20 Vic., ch. 3.—See Assignments, 3.

———ch. 69.—See Highway, 2.

———ch. 146.—See Great Western R. W. Co.

STATUTE OF FRAUDS.

See FRAUDS (STATUTE OF).

STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF).

STAYING PROCEEDINGS.

See DIVISION COURT.

SUNDAY.

See CRIMINAL LAW, 2.

SURETY.

See PRINCIPAL AND SURETY.

SURVEYOR.

See WITNESS.

TAVERN LICENSES.

See MUNICIPAL CORPORATIONS—3.

TAXES.

See ATTORNEY—RAILWAYS AND
RAILWAY COMPANIES, 10.

1. *Extension of time for collection—Duration of Collector's authority.*]-The time for levying a school tax in the city of Kingston, imposed by by-law in December, 1855, was extended by resolutions of the city council, under 18 Vic., ch. 21, sec. 3, until the 1st of August, 1856, and again, on the 22nd of December, 1856, to the 1st of March, 1857. —*Held*, that the collector, who was the same person for both years, might distrain between the 1st of August and the 22nd December, 1856, although no resolution extending the time was then in force; *McLean, J.*, dissenting, —*Newberry v. Stephens, et al.*, 65.

2. *Sale for taxes—Distress*—16 Vic. ch. 182.]-Under the 16 Vic., ch. 182, the sheriff may sell land for taxes, as directed by the writ, unless he has good reason to believe that there is sufficient distress. A declaration, therefore, which charged him with neglect of duty in selling when there were goods on the land to distrain, but did not aver that he had notice of the goods being there, was held insufficient. ---*Foley v. Moodie, Sheriff*, 254.

TELEGRAPH COMPANY.

Action for negligence in sending telegraphic message---Liabilities for delay beyond defendants' line---Measure of damages---Fall in flour market.]-Defendants owned a telegraph extending to Buffalo only, but in their printed hand bills they advertised their line "as connecting with all the principal cities and towns in Canada and the United States," and they received the charge for transmission to places beyond their line. The plaintiff had some flour in the hands of N., his agent at New York, and about 3 p. m. on the 23rd of November, delivered to defendants at Hamilton the following message, addressed to N., paying charge to New York; "Am disposed to realize---sell 1500 barrels." At the time of delivering the message nothing was said as to its importance, or the necessity of its immediate despatch, and owing to defendants' line being out of order it was not sent till 5 on the following afternoon---being Saturday. The defendants' operator received it at Buffalo, and on the same day delivered it at the office of the American Company to transmit to New York, paying their charge. It was not received by the plaintiff's agent in New York until after business hours on the 26th, and in the meantime the price of flour had fallen materially. The agent therefore did not sell, but held the flour until the end of December, and as the market had continued to fall, it then realized nearly 5s. a barrel less than could have been obtained on the 23rd or 24th. In an action against defendants for negligence in transmitting and delivering the message at New York the jury found for the defendants; and on motion for new trial, —*held*, that the verdict must stand, for the only negligence shewn

was in delivering the message at New York, and if defendants were liable for that they would not be answerable for loss caused by a fall in the market, but under the evidence for nominal damages only.---*Per Robinson, C.J. and McLean, J.*—Defendants, under the facts proved could not be held liable for delay beyond their own line, but were bound only to transmit the message to Buffalo, and hand it to the American Company there, paying the charge to New York.---*Per Burns J.*---That defendants were liable as upon an undertaking to transmit the message to New York, and deliver it there.--*Stevenson v. The Montreal Telegraph Company*, 530.

TITLE.

See COUNTY COURT

Action for negligence in investigation of]---See ATTORNEY.

Notice of in Ejectment]---See EJECTMENT.

Action on Covenants for]---See VENDOR AND VENDEE, 1, 2.

TRESPASS.

See CROWN LANDS.

UNCERTAINTY.

See DESCRIPTION—INQUISITION.

USE AND OCCUPATION.

See FERRY.

VENDOR AND VENDEE.

See DISTRESS.---INSURANCE, 3.

1. *Deed of land and mortgage back--Prior Lease---Covenants for title--Right to sue on—Money paid]*—The

defendant conveyed land to the plaintiff by deed, made under the act to facilitate the conveyance of real property, containing covenants for right to convey, for quiet possession, and that he had done no act to incumber, and on the same day took back a mortgage in fee to secure the purchase money, in which it was provided that the plaintiff should retain possession until default. Before making the deed the defendant had leased land to one D., to whom the plaintiff was obliged to pay £66 to obtain possession. *Held*, that this sum could not be recovered as money paid, and that the plaintiff could not sue upon the covenants in the deed while the mortgage continued in force. *Proctor v. Gamble*, 110

2. *Covenant against incumbrances on sale of vessel—Action thereon—Effect of notice to vendee of the incumbrance complained of—Equitable defence—Payment of purchase money.]*—*McDonell et al, v. Thompson*, 154.

3. *Bond to convey land--Measure of damages.]*—In an action on a bond to convey land within a certain time, where defendant's inability arose from his having neglected to do the settlement duties, and take out the patent. *Held*, that the plaintiff's damages were not confined to the purchase money paid and interest. *Plumer et al. v. Simonton*, 220.

4. *Sale of goods—Notes to be given--Effect of delivery.]*—Defendant purchased some horses and a wagon from the plaintiff, at auction, the terms being that he should give his own notes at three, six, and nine months, endorsed by one W., and on his promise to give these, he was allowed to take the goods. W. refused to endorse, and the

plaintiff having waited for some time without getting the notes, replevied. It was left to the jury to say whether the delivery was absolute, with intent to pass the property, or conditional on defendant's giving the notes, and they found for the plaintiffs. *Held*, a proper direction, and that the verdict was warranted. *Smith v. Hobson*, 368.

5. *Sale of goods—Payment by check.*]—Defendant bought goods from the plaintiffs, paying part in cash, and giving for the balance a bank check drawn by H. payable to bearer. Plaintiffs presented the check early next morning, but there were no funds; and at the end of a week, after repeatedly calling upon H., they demanded payment from defendant. *Held*, that they could not recover, for, first, the check must be taken to have been received as cash; and secondly, the plaintiffs had at all events made it their own by the delay in calling on defendant.—*Redpath et al. v. Kolfage*, 433.

6. *Agreement to make bricks for plaintiff—Construction of—When the property vests.*]—In an action to try the right to certain bricks, it appeared that they had been made by one D. for the plaintiff, who were to find the wood to burn the kilns, and deduct it from the price, and had supplied wood to the extent of several hundred pounds. The bricks had not been delivered, and defendant claimed them under an assignment from D. *Held*, that it was properly left to the jury to say, whether by the agreement between the plaintiffs and D. the bricks were to become the plaintiffs' property as soon as they were made; and that, under the evidence given, they were justified in

finding that they were. *Burnett et al. v. McBean*, 466.

7. *Sale of land subject to mortgage—Promise to indemnify against mortgage—Declaration—Practice in demurrer.*]—Declaration, that in consideration that the plaintiff would sell and convey to defendant certain lands for £700, defendant promised to pay off said mortgage, and save the plaintiff harmless therefrom: that in pursuance of said agreement the plaintiff then sold and conveyed said lands to defendant: that the defendant not having saved harmless the plaintiff from the said mortgage, and the sum of £123 being due thereon, the plaintiff was obliged to pay it, of which the defendant had notice, but hath not repaid the same to the plaintiff, or indemnified him for such payment.—*Held*, good, on demurrer, *Martin v. Arthur*, 483.

8. *Sale of lands—Mortgage for purchase money—Effect of judgment and executions against the purchaser.*]—Where lands are conveyed to a purchaser, against whom judgments are then registered, and executions against lands in the sheriff's hands, and a mortgage is taken back on the same day for a balance of purchase money, the judgments and executions attach before the mortgage. *Ruttan v. Levisconte*, 495.

9. *Agreement to sell land—Liquidated damages or penalty—Uncertainty of description.*]—Where in a contract for the sale of land, it was agreed that in case either of the parties should retract, he "should pay to the other, by way of ascertained and liquidated damages the sum of £100." *Held*, that such sum could not be treated as a penalty. An agreement to

sell and convey, or a deed of "one acre of land, being part of the north-east quarter of lot 19, in the 7th concession of Darlington," is not void for uncertainty, but the purchaser may elect what acre he will have. *Cummings v. McLachlan*, 626.

VENIRE FACIAS.

See BOND.

WHARFINGER.

See LIEN, 2.

WILL.

1. *Proof of will executed out of U. C.*—16 Vic., ch. 19, sec. 5.—"*Her Majesty's possessions.*"]—The words "*Her Majesty's possessions out of Upper Canada,*" used in 16 Vic., ch. 19, sec. 5, include England: and it was held, therefore, that the probate of a will executed there, under the seal of the Prerogative Court of Canterbury, was properly received in evidence.—*Coltman et al. v. Brown*, 133.

2. *Construction of—Estate in fee, or during widowhood.*]—Under the following will: "In the first place, my will is that my beloved wife shall inherit all my messuages and tenements, situated and lying in the township of Colchester, known and described by the half of lot No. 71, and lot No. 72, containing in all 300 acres, more or less, with the appurtenances thereunto belonging; also all my personal estate, goods and chattels, of what kind and nature soever, I give and bequeath to my loving wife, during her widowhood; and in case of her marriage or decease, then to be disposed of and equally divided between my sons and

daughters," &c., (naming them). To my son J. S. I bequeath 100 acres of land (describing it). "And for the execution hereof I do hereby appoint T. M. and C. S. to be my executors of this my last will and testament, with full power and authority to do and perform every thing herein mentioned." The will bore date 21st of August, 1818. On the 21st of September following this codicil was added: "And further, it is my will that my youngest daughter, Eliza, born on the 23rd of August, during my sickness, should equally share with the rest of my children (naming them); and in case of the death of either of the above named children before the estate be divided, then their share to be justly divided between the survivors." Held, that the widow took a fee in the land first mentioned: *McLean, J.*, dissenting, and holding that, upon the construction of the whole will, with the codicil, the direction for a division in case of her marriage or decease should be applied to the real as well as to the personal property. *Ebenezer Wright and Eliza Wright, his wife, v. Francis Wright*, 184.

WITNESS.

See CRIMINAL LAW, 4.

Power of commissioners under 12 Vic., ch. 81, sec. 181, to summon witnesses.]—See ACTION.

A person not being a licensed surveyor is a competent witness on a question of boundary. *Potter v. Campbell et al.*, 109.

WOODSTOCK AND LAKE ERIE RAILWAY CO.

19 Vic. ch. 84—*Construction of—*

Equitable Pleadings.]—The Woodstock and Lake Erie Railway and Harbour Company gave a bond to the Town Council of Woodstock, reciting that the Council had agreed to lend them £25,000 to assist in constructing their railway, and conditioned that the Company should not expend the loan, nor begin to construct their road, until the whole sum necessary to complete it from Woodstock to Port Dover should be obtained. *Held*, that there was nothing in the 19 Vic., ch. 74, (the

provisions of which are set out in the case) to relieve defendants from liability for a previous breach of this condition. *The Town Council of the Town of Woodstock v. The Woodstock and Lake Erie Railway and Harbour Company*, 146.

WORDS (CONSTRUCTION OF.)

“*Her Majesty's possessions out of Upper Canada.*”]—See WILL, I.

